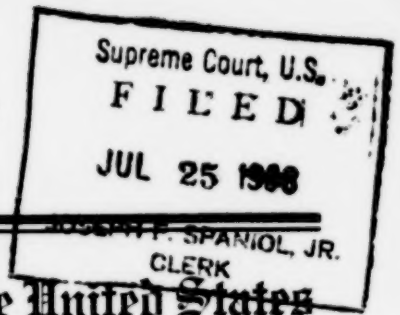


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No. 85-5939



In the Supreme Court of the United States

OCTOBER TERM, 1986

EULOGIO CRUZ, PETITIONER

v.

NEW YORK, RESPONDENT

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 29, 1985
CERTIORARI GRANTED JUNE 9, 1986

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CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES

Date	Proceedings
May 13, 1982	—Indictment No. 1793/82 is filed against Benjamin Cruz in New York State Supreme Court, Bronx County.
June 11, 1982	—Indictment No. 2232/82 is filed against petitioner Eulogio Cruz in New York State Supreme Court, Bronx County.
May 9, 1983	—The People move to consolidate the two indictments for trial.
May 23, 1983	—Justice Joseph Cohen orders the indictments consolidated for trial.
May 31, 1983	—Eulogio Cruz moves prior to trial to sever his case from that of Benjamin Cruz. Justice Fred W. Eggert reserves decision.
June 7, 1983	—The first joint trial of Eulogio Cruz and Benjamin Cruz commences before Justice Eggert and a jury.
June 10, 1983	—Justice Eggert issues an order and opinion denying Eulogio Cruz's motion to sever.
June 14, 1983	—Justice Eggert declares a mistrial upon manifest necessity.
September 26, 1983	—Prior to the second trial, Justice Joseph A. Cerbone issues an order and opinion denying Eulogio Cruz's renewed motion to sever.
September 27, 1983	—The second joint trial of Eulogio Cruz and Benjamin Cruz commences before Justice Cerbone and a jury.
October 5, 1983	—The jury finds both defendants guilty of murder in the second degree.

Date	Proceedings
October 31, 1983	—The court imposes judgment sentencing Eulogio Cruz to 15 years to life in prison. Eulogio Cruz files a notice of appeal from the judgment.
December 15, 1983	—Eulogio Cruz is granted leave to appeal as an indigent.
October 11, 1984	—Eulogio Cruz's appeal is argued before a panel of the New York State Supreme Court, Appellate Division, First Department.
October 25, 1984	—The New York Supreme Court, Appellate Division, First Department, affirms Eulogio Cruz's judgment of conviction without opinion.
January 3, 1985	—Judge Bernard S. Meyer, Associate Judge of the Court of Appeals, grants Eulogio Cruz leave to appeal to the Court of Appeals.
February 5, 1985	—Eulogio Cruz is granted leave to appeal to the New York Court of Appeals as an indigent.
September 9, 1985	—Eulogio Cruz's appeal is argued before the New York Court of Appeals.
October 17, 1985	—The New York Court of Appeals affirms the order of the New York Supreme Court, Appellate Division. Judges Judith Kaye and Bernard S. Meyer dissent from the court's decision.

INDICTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

Indictment No. 2232/1982

THE PEOPLE OF THE STATE OF NEW YORK

*Against*X. EULOGIO MEDINA CRUZ—AFO, VFO
AKA EULOGIO CRUZ MEDINA, DEFENDANT

COUNTS

Murder in the Second Degree 125.25 (2 Counts)
 Robbery in the First Degree 160.15 (2 Counts)
 Robbery in the Second Degree 160.10
 Criminal Possession of a Weapon in the Second Degree 265.03 (2 Counts)
 Criminal Use of a Firearm in the Second Degree 265.08 (2 Counts)
 Criminal Use of a Firearm in the First Degree 265.09 (2 Counts)

Date Voted: 6-2-82

Date Filed: 6-11-82

A True Bill

/s/ Jon Doody
ForemanMARIO MEROLA
District Attorney

FIRST COUNT

The Grand Jury of the County of the Bronx, by this indictment, accuse the defendant of the crime of murder in the second degree committed as follows:

The defendant acting in concert with other persons on or about November 29, 1981, in the County of the Bronx, with intent to cause the death of Victoriano Agostini, caused the death of Victoriano Agostini by shooting him with deadly weapons, to wit; loaded pistols.

SECOND COUNT

The Grand Jury of the County of the Bronx, by this indictment, accuse the defendant of the crime of murder in the second degree committed as follows:

The defendant acting in concert with other persons on or about November 29, 1981, in the County of the Bronx, having committed the crime of robbery, and in the course of and in furtherance of such crime and of immediate flight therefrom, caused the death of Victoriano Agostini he being other than a participant, by shooting him with deadly weapons to wit: loaded pistols.

THIRD COUNT

The Grand Jury of the County of the Bronx, by this indictment, accuse the defendant of the crime of robbery in the first degree committed as follows:

The defendant acting in concert with other persons on or about November 29, 1981, in the County of the Bronx, forcibly stole certain property, to wit: a quantity of United States currency from Victoriano Agostini, and in the course of the commission of the crime and of immediate flight therefrom, the defendant and aforesaid other persons caused serious physical injury to Victoriano Agostini who was not a participant in the crime.

FOURTH COUNT

The Grand Jury of the County of the Bronx, by this indictment, accuse the defendant of the crime of robbery in the first degree, committed as follows:

The defendant acting in concert with other persons on or about November 29, 1981, in the County of the Bronx, forcibly stole certain property, to wit: a quantity of United States currency from Victoriano Agostini, and in the course of the commission of the crime and of immediate flight therefrom, the defendant and aforesaid other persons were armed with deadly weapons, to wit: loaded pistols.

The subject matter of this count being an armed felony as that term is defined in section 1.20 of the criminal procedure law.

FIFTH COUNT

The Grand Jury of the County of the Bronx, by this indictment, accuse the defendant of the crime of robbery in the second degree committed as follows:

The defendant acting in concert with other persons on or about November 29, 1981, in the County of the Bronx, being actually present, forcibly stole certain property, to wit: a quantity of United States currency from Victoriano Agostini.

SIXTH COUNT

The Grand Jury of the County of the Bronx, by this indictment, accuse the defendant of the crime of criminal possession of a weapon in the second degree committed as follows:

The defendant acting in concert with other persons on or about November 29, 1981, in the County of the Bronx, knowingly and unlawfully possessed a loaded firearm, to wit: a pistol, with intent to use unlawfully against another.

The subject matter of this count being an armed felony as that term is defined in section 1.20 of the criminal procedure law.

SEVENTH COUNT

The Grand Jury of the County of the Bronx, by this indictment, accuse the defendant of the crime of criminal possession of a weapon in the second degree committed as follows:

The defendant acting in concert with other persons on or about November 29, 1981, in the County of the Bronx, knowingly and unlawfully possessed a loaded firearm, to wit: a pistol, with intent to use unlawfully against another.

The subject matter of this count being an armed felony as that term is defined in section 1.20 of the criminal procedure law.

EIGHTH COUNT

The Grand Jury of the County of the Bronx, by this indictment, accuse the defendant of the crime of criminal use of a firearm in the second degree committed as follows:

The defendant acting in concert with other persons on or about November 29, 1981, in the County of the Bronx, having committed a class C violent felony offense as defined in paragraph (B) of subdivision one of section 70.02 of the penal law, the defendant and aforesaid other persons knowingly and unlawfully possessed a deadly weapon, to wit: a pistol, which was a loaded weapon from which a shot, readily capable of producing death and other serious injury, may have been discharged.

The subject matter of this count being an armed felony as that term is defined in section 1.20 of the criminal procedure law.

NINTH COUNT

The Grand Jury of the County of the Bronx, by this indictment, accuse the defendant of the crime of criminal

use of a firearm in the second degree committed as follows:

The defendant acting in concert with other persons on or about November 29, 1981, in the County of the Bronx, having committed a class C violent felony offense as defined in paragraph (B) of subdivision one of section 70.02 of the penal law, the defendant and aforesaid other persons knowingly and unlawfully possessed a deadly weapon, to wit: a pistol, which was a loaded weapon from which a shot, readily capable of producing death and other serious injury, may have been discharged.

The subject matter of this count being an armed felony as that term is defined in section 1.20 of the criminal procedure law.

TENTH COUNT

The Grand jury of the County of the Bronx, by this indictment, accuse the defendant of the crime of criminal use of a firearm in the first degree committed as follows:

The defendant acting in concert with other persons on or about November 29, 1981, in the County of the Bronx, having committed a class B violent felony offense as defined in paragraph (A) of subdivision one of section 70.02 of the penal law, the defendant and foresaid other persons knowingly and unlawfully possessed a deadly weapon, to wit: a pistol, which was a loaded weapon from which a shot, readily capable of producing death and other serious injury, may have been discharged.

The subject matter of this count being an armed felony as that term is defined in section 1.20 of the criminal procedure law.

ELEVENTH COUNT

The Grand Jury of the County of the Bronx, by this indictment, accuse the defendant of the crime of criminal use of a firearm in the first degree committed as follows:

The defendant acting in concert with other persons on or about November 29, 1981, in the County of the Bronx,

having committed a class B violent felony offense as defined in paragraph (A) of subdivision one of section 70.02 of the penal law, the defendant and aforesaid other persons knowingly and unlawfully possessed a deadly weapon, to wit: a pistol, which was a loaded weapon from which a shot, readily capable of producing death and other serious injury, may have been discharged.

The subject matter of this count being an armed felony as that term is defined in section 1.20 of the criminal procedure law.

MARIO MEROLA
District Attorney

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Indictment No. 1793/82

THE PEOPLE OF THE STATE OF NEW YORK

—against—

BENJAMIN CRUZ, DEFENDANT

Indictment No. 2332/82

THE PEOPLE OF THE STATE OF NEW YORK

—against—

EULOGIO MEDINA CRUZ
AKA EULOGIO CRUZ MEDINA, DEFENDANT

NOTICE OF MOTION FOR ORDER CONSOLIDATING
THESE TWO (2) SEPARATE INDICTMENTS

SIR:

PLEASE TAKE NOTICE, that upon the annexed affirmation of NATHAN D. ROSENBLATT, Assistant District Attorney of Bronx County, dated May 9, 1983, and all the proceedings previously had, the People of the State of New York will move this Court at Part 40 thereof, at the Courthouse located at 851 Grand Concourse, Bronx, New York on the 23rd day of May, 1983 at 9:30 A.M. or as soon thereafter as Counsel may be heard, for an order pursuant to Criminal Procedure Law,

Section 200.40 (2) directing that Indictment #1793/82 (People vs. Benjamin Cruz and Indictment #2332/82 (People vs. Eulogio Medina Cruz) be consolidated for trial and for such other and further relief as this Court may seem just and proper.

Dated: Bronx, New York
May 9, 1983

Yours, etc.

MARIO MEROLA
District Attorney
Bronx County

By: /s/ Nathan D. Rosenblatt
NATHAN D. ROSENBLATT
Assistant District Attorney

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

[Title Omitted in Printing]

**AFFIRMATION IN SUPPORT OF MOTION TO
CONSOLIDATE TWO (2) SEPARATE INDICTMENTS**

NATHAN D. ROSENBLATT, under penalty of perjury and pursuant to C.P.L.R., 2106 hereby states and affirms:

That I am an Assistant District Attorney in the office of Mario Merola, District Attorney of Bronx County and I make this affirmation in support of the annexed notice of motion for an order directing the consolidation of indictments 1793/82 and 2232/82 for trial.

That on May 13, 1982, Mr. Benjamin Cruz was indicted for two counts of Murder in the Second Degree, two counts of Robbery in the First Degree, one count of Robbery in the Second Degree, Criminal Possession of a Weapon in the Second Degree; Criminal Use of a Firearm in the Second Degree and Criminal Use of a Firearm in the First Degree under indictment #1783/82.

That on June 11, 1982, Mr. Eulogio Medina Cruz was indicted for Two Counts of Murder in the Second Degree, Two counts of Robbery in the First Degree, Robbery in the Second Degree, two counts of Criminal Possession of a Weapon in the Second Degree. Two counts of Criminal Use of a Firearm in the Second Degree; two counts of a Firearm in the First Degree under indictment #2232/82.

People consent to dismiss the Seventh, Ninth and Eleventh counts of indictment 2232/82.

Copies of both indictments are annexed hereto as People's exhibits "I" and "2".

That these indictments charge each defendant with acting in concert with other persons in causing the death of Victoriano Agostini on November 29, 1981 and with

the same Criminal Possession and use of the same weapon.

That the crimes charged against Benjamin Cruz and Mr. Eulogio Medina Cruz of the same incident.

That Mr. Benjamin Cruz was arrested on May 3, 1982 and Mr. Eulogio Medina Cruz was arrested on April 14, 1983. As a result, Mr. Benjamin Cruz was indicted prior to Eulogio Medina Cruz.

That the witnesses in each indictment are substantially the same.

That the crimes charged in each indictment are identical and arise out of the exact same incident involving the same victim Victoriano Agostini.

That having to call numerous witnesses to testify at two trials would constitute an undue hardship which could be avoided with one trial since the witnesses are the same in each case.

That two trials would require excessive use of court time and cause great expense to the People of Bronx County.

That a single trial would insure each defendant a speedy trial and early disposition of each of the aforementioned indictments. Further, each defendant is remanded.

That no previous application for the relief prayed for herein has been made to this or any court.

WHEREFORE, the People respectfully request that the aforementioned two (2) indictments be consolidated and that a joint trial be ordered thereon, together with such other and further relief as this court may seem just and proper.

Dated: Bronx, New York
May 9, 1983

Respectfully submitted,

/s/ Nathan D. Rosenblatt
NATHAN D. ROSENBLATT
Assistant District Attorney

[Affidavit of Service Omitted in Printing]

NEW YORK SUPREME COURT
PART 60 (40)—COUNTY BRONX

Indictment Numbers 1793, 2232/82

THE PEOPLE OF THE STATE OF NEW YORK

—against—

BENJAMIN CRUZ, DEFENDANT

ORDER CONSOLIDATING INDICTMENTS

Present:

HON. JOSEPH COHEN
J.S.C.

Upon the foregoing papers this Motion is disposed of as follows: 1) Counts 7, 9 & 11 of Indict. 2232 of 1982 are dismissed. 2) Both indictments are consolidated for trial.

Opinion filed,
Dated 5/23/83

JOSEPH COHEN
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 62

Ind. Nos. 1793, 2232/82

THE PEOPLE OF THE STATE OF NEW YORK

v.

BENJAMIN CRUZ & EULOGIO MEDINA CRUZ, DEFENDANTS

Before: Hon. Fred Eggert, Justice

TRANSCRIPT OF PROCEEDINGS,
FIRST TRIAL

May 31, 1983
851 Grand Concourse
Bronx, New York

Proceedings

* * * *

Colloquy

* * * *

[120] MR. BLITZ: I'm being facetious, your Honor.
I'm moving for a severance in fact.

THE COURT: That brings us to the Bruton Issue.
Now Mr. Katz, at this point, do you contemplate that
your defendant will testify on the trial?

MR. KATZ: Well your Honor, that is a possibility.
I'm reserving my right, of course, based upon the People's

case. If I feel the People have not met their burden,
obviously I will not put my client on, but rest. But should
something come about during the People's case where I
feel that it is in the best interests of my client to
testify, that I certainly will reserve the right to call him.

THE COURT: All right. On Bruton, Mr. Blitz, do
you wish to be heard?

[121] MR. BLITZ: Yes, judge.

Your Honor, the testimony is that Mr. Benjamin Cruz,
of whom we have seen a video tape, inculcates my client
in the crime that is charged, that he's charged with in
the indictment, and all the counts therein, your Honor.
Should he not testify, I would have no opportunity to
confront him, to cross-examine him.

Certainly, your Honor, that video tape is devastat-
ing as far as my client is concerned, and I don't see how
my client could get a fair trial, even with any curative
instructions to the jury to disregard it.

I don't see how they could disregard it in fairness, and
how we could possibly not be prejudiced by the statement,
should Mr. Cruz not testify on the trial itself.

At this point, your Honor, we don't know if he's going
to testify and certainly, your Honor, I don't want to
take that risk because if he doesn't testify, I have no
opportunity to cross-examine any statements that he made
or anything that he may have said in the video tape.

THE COURT: Mr. Rosenblatt?

[122] MR. ROSENBLATT: Your Honor, I just want
to submit to the Court that I've turned over certain
Grand Jury testimony and the People intend to call a
particular witness that will testify as to what the de-
fendant Benjamin Cruz told him, and what the defendant
Eulogio Cruz told him in the presence of each other, and
the People submit, your Honor, that we have a state-
ment made by the defendant Benjamin Cruz to Detective
Wood.

We have also a video statement of a statement made
by Benjamin Cruz to A.D.A. Karen, coupled with a—

with statements that were made to a third party, even though the third party was not a public officer or a police officer.

* * * *

[123] So in view of that, and in view of all these statements are somewhat interlocking, that would come under the Mac Neal cases, and the subsequent cases, they are interlocking and they are interwoven and the People feel that this situation will take it out of the Bruton problem.

THE COURT: Did each, at the time of the alleged statements that were made to the civilian that you just mentioned, were separate statements made by defendant?

MR. ROSENBLATT: Well, these were statements that were made to my interrogation of a witness shortly thereafter the shooting and in the presence of each other.

THE COURT: That's not my question. I'm not talking about in the presence of each other, but did each one make a separate statement?

MR. ROSENBLATT: It is my understanding of my [124] interrogation of the particular witness, each of them said certain things.

In other words, Benjamin Cruz told this witness, and Eulogio Cruz told this witness something.

THE COURT: Yes, Mr. Blitz?

MR. BLITZ: Your Honor, as far as the record is concerned, there is nothing particular this Court—for this Court to make a determination. Number one, whether a statement was in fact made. Number two, whether it was made by my client. And number three, in what ways it could possibly be interlocking to take it out.

If anything, I believe this Court must conduct a hearing to determine whether that statement is interlocking, whether it was in fact made by my client, and what was alleged to have been said by my client. There is nothing in the record to show that a statement had been made for what that statement contained, your Honor.

THE COURT: Well, since there appears to be a question of fact on whether or not it's interlocking, the Court will reserve decision on the Bruton Issue.

[125] We'll research with the joint trial, but I'm reserving on your motion, Mr. Blitz.

* * * *

June 9, 1983

Proceedings.

* * *

Colloquy

* * *

[277] MR. BLITZ: At this time, your Honor, I respectfully move for a mistrial. If I rested now, the jury would have before it, the testimony and the video tape of Benjamin Cruz, and despite your Honor's curative instructions and the testimony of Ronda, the Spanish Interpreter of Wood, of all the statements allegedly made by Mr. Benjamin Cruz. Despite your Honor's curative instructions, how could the jury possibly put that out of his mind, out of their minds and how could they—my client possibly get a fair trial?

It certainly is a Bruton situation that cannot be compared as two separate statements, your Honor, or interlocking statements. This is a video tape of a co-defendant, and I don't see how the jury can deliberate and put that out of their mind and deliberate solely on what was presented against my client.

I respectfully move for a mistrial.

THE COURT: Mr. Rosenblatt.

MR. ROSENBLATT: I just want to state, your [278] Honor, that as Mr. Blitz said, is true of the video tape. But in this situation, your Honor, we go a step further. We have an independent witness that has testified and given evidence to this Court, in which he stated that both Benjamin Cruz told him what happened on that morning and what happened is what Eulogio Cruz told him in the presence of each other, Judge, and that all three were present, and they both describe as to the incident, and what they were doing; that they were going to rob this gasoline station, and during the struggle, between Eulogio Cruz and the deceased, that this defendant, Benjamin Cruz, did shoot and kill the deceased.

Now, both of these statements of their complicity that both of these defendants were told to the witness and in

their presence, I respectfully submit, your Honor, that this takes out of the Bruton situation because the whole thing is part and parcel of one transaction, more or less, and that this case does not fall within the Bruton theory of severance

THE COURT: While counsel has moved for a mistrial, I assume, actually, it's a motion for a severance, insofar as the defendant, Eulogio Cruz, is concerned.

[279] MR. BLITZ: It's too late for a severance now, your Honor.

THE COURT: Pardon?

MR. BLITZ: It's too late for a severance now.

THE COURT: No, it's not.

The motion for a mistrial is denied.

We have testimony here by the defendant, Benjamin Cruz inculpatory the defendant, Eulogio Cruz. On each occasion that the defendant, Benjamin Cruz, made those statements, the Court gave an immediate curative instruction. In fact, it gave such instructions to the jury, approximately, five or six times. I am aware of course, of various cases hold that curative instructions are insufficient for what's real stick about it. However, we have more than just the statement of the defendant, Benjamin Cruz. There was the testimony of Norberto Cruz, who is not a defendant in this action, but who testified to inculpatory statement made by the defendant Eulogio Cruz as well as the defendant Benjamin Cruz.

Cases do not require that the interlocking statements interlock in every element. It's pointed out in the Bursoff case (Phonetic), in both statements the defendants each put themselves at the scene of the [280] crime and indicated a common participation in the crime; and the Court in Sursoff's (Phonetic) case held that that was sufficient, even though there could be minor differences in the statements. So, it would appear here that there is four interlocking—There are interlocking confessions, but nonetheless, I previously have denied your motion, Mr. Blitz, for

a severance, conditionally, pending on certain further testimony.

I will again deny your motion for a severance conditionally pending further testimony in this case.

MR. BLITZ: Exception, your Honor.

THE COURT: The motion for a mistrial is denied. The motion for a severance is denied conditionally, as indicated.

* * * *

June 10, 1983

Proceedings.

* * * *

Colloquy

* * * *

[312] MR. BLITZ: * * *

At this time, I again renew my motion for a mistrial, your Honor, and a severance and/or a severance your Honor, based upon the arguments I've given before and ask the Court to rule on that at this time.

THE COURT: That motion is denied for the reasons set forth in the Court's ruling on a prior similar motion made yesterday or the day before.

MR. BLITZ: The other way, your Honor, said it was conditionally denied.

THE COURT: Yes.

MR. BLITZ: Is it still conditionally denied?

THE COURT: No, it's denied for all purposes. Unconditionally.

MR. BLITZ: Except, your Honor.

* * * *

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 62

Indictment # 2232/82

THE PEOPLE OF THE STATE OF NEW YORK

—against—

EULOGIO CRUZ, DEFENDANT

DECISION AND ORDER DATED JUNE 10, 1983,
DENYING SEVERANCE

DECISION

EGGERT, J.:

The following constitutes the decision and order of the court on defendant Eulogio Cruz' motion for a mistrial and severance.

This case presents the question whether the "interlocking confessions" exception to the rule in *Bruton v. United States*, (391 US 123) applies when a co-defendant at a joint trial makes a confession to the authorities implicating the defendant and the defendant makes an "interlocking" admission to a private citizen acquaintance, rather than to the authorities.

Bruton (supra) holds that it is error to permit a defendant to be tried jointly with a co-defendant where the co-defendant has made a confession which will be introduced against him and which also implicates the defendant, (assuming the co-defendant does not testify). This is because the defendant has no way of cross-examining his co-defendant as to this damaging testimony, and it would be futile for the court to give instructions limiting the co-defendant's statements to the co-defendant himself.

Nevertheless, our Court of Appeals has long recognized an exception to *Bruton*, "where each of the defendants

has himself made a full voluntary confession which is almost identical to the confessions of his co-defendants" (*People v. McNeil*, 24 NY 2d 550, 552). This exception, which was approved by a plurality of the Supreme Court of the United States in *Parker v. Randolph*, (442 US 62), would permit receipt of the co-defendant's confession at a joint trial, with instructions that it is evidence against the co-defendant only.

The pertinent facts are as follows:

The two co-defendants, Benjamin and Eulogio Cruz, who are brothers, are charged with felony murder and robbery in connection with a gas station holdup in which Benjamin allegedly shot and killed the attendant while Eulogio actively participated in the holdup. The only evidence connecting Eulogio with the crime is the testimony of his acquaintance, Norberto Cruz (no relation) that shortly after the crime both Cruz brothers came to Norberto and boasted of their involvement in the holdup and admitted their full criminal liability. Many months later, after Norberto had had a falling-out with the Cruz brothers, he revealed these admissions to the police while the police were conducting another investigation. Norberto was not a suspect in this or any other crime at that time and there is no claim that he was offering these revelations in return for lenient treatment from the police. Eulogio made no statement to law enforcement authorities.

Benjamin made a statement to the police and then a more detailed statement on videotape to an Assistant District Attorney. In his statements he admits that he was the shooter and gives a detailed account of his brother Eulogio's participation in the crime. These statements by Benjamin are being received as evidence against Benjamin at the trial. Benjamin is not testifying at the trial.

The two statements interlock fully as to the details of the crime and as to the full liability of each defendant for the crimes charged. The significant difference between the statements is as follows: While there is no dispute

that Benjamin's videotaped statement was actually made, Norberto's account of his conversation with the Cruz brothers is being attacked as a fabrication.

Eulogio moved for a severance prior to trial and this Court denied the motion with leave to renew at the close of the trial evidence. At the end of trial evidence Eulogio moved for a mistrial and renewed his motion for a severance.

To determine whether the "interlocking confessions" exception applies to confessions made under the radically different circumstances present in this case, we turn to the oft-stated rationale for this exception: "The justification for this exception is that separate confessions, without being mirror images of each other, may yet be so duplicative in their description of the crucial facts that the one of the non-testifying co-defendant may be of no measurable consequence in the face of the overwhelming and largely uncontroverted evidence contained in the interlocking confession of the defendant himself (citations omitted)", (*People v. Berzups*, 49 NY2d 417, 425). Consequently, the exception only applies where the contents of the two confessions fully interlock as to the facts, or at least interlock to the extent that the defendant is unambiguously admitting criminal liability for the crime charged (*People v. Berzups*, *supra*, at 426).

For example, in *People v. Smalls* (55 NY 2d 407) the co-defendant made a confession in which he directly implicated the defendant as a knowing participant in the crime, while the defendant, on the other hand, made a confession which was ambiguous as to his knowing participation. The Court of Appeals held that it was error to jointly try the defendant and co-defendant and admit the co-defendant's confession because of the danger that the jury might have resolved the ambiguities in the defendant's confession by reference to the co-defendant's confession. Thus, the co-defendant's confession, which was not subject to cross-examination, would have added sub-

stantially to the case against the defendant (see also *People v. Burns*, 84 AD 2d 845).

It is clear that the interlocking confessions exception requires the confessions to interlock as to *content*. However, there does not appear to be any requirement in the case law that they interlock as to anything else, such as the persons to whom the confessions were made, the circumstances of making, and the reliability of the evidence that the confessions were actually made (see *People v. Woodward*, 50 NY 2d 922).

In the instant case, defendant Eulogio Cruz argues that "interlocking" as to content is not enough. Here, Eulogio contends that he never made a confession to Norberto, and claims that Norberto made up the whole story out of malice and other unworthy motives. However, in view of the videotaping, it is undisputed that Benjamin did in fact make an interlocking confession implicating Eulogio. Therefore, defendant argues that the reasoning of *People v. Smalls* (*supra*) should apply with equal force, since there is a grave danger that a jury would resolve any doubts about whether Eulogio in fact confessed to Norberto by making reference to Benjamin's video confession.

While this argument may appear to have some merit it is the same argument unsuccessfully raised by the dissenters in the leading cases which established the interlocking confessions exception at the State and Federal levels. In *People v. McNeil*, (*supra* at pp. 555-556), Chief Judge Fuld pointed out in his dissent that if there is a question about the truth or voluntariness of a defendant's confession, a jury might improperly resolve that doubt by reference to a co-defendant's confession. In *Parker v. Randolph* (*supra* at pp. 84-85), Justice Stevens' dissent posed the hypothetical situation in which a co-defendant confesses on live television and implicates the defendant, while the defendant himself makes an "interlocking confession" which is vaguely recalled by a drinking partner, former cellmate, or a divorced spouse. Notwithstanding

these arguments, the highest courts of this State and Nation have recognized an interlocking confession which does *not* depend on the reliability of the defendant's own confession.

In *Tamilio v. Fogg*, 546 F. Supp. 372, the petitioner argued that under *Parker v. Randolph* (*supra*), the interlocking confessions exception does not apply if the defendant attacks his own alleged confession as a fabrication. The District Court (Neaher, J.) rejected that interpretation of *Parker* on the grounds that it would allow any defendant to avoid the interlocking confession rule by merely disclaiming his own confession. (The court did grant habeas corpus relief on the grounds that the confessions were not fully interlocking and because the fact that the petitioner's alleged confession was a highly suspect confession to a cellmate added to the prejudice caused by the improper receipt of the co-defendant's confession at the joint trial [See *People v. Santanella*, 63 AD 2d 744]).

As a final note, in this case defendant Eulogio Cruz' confession to Norberto is not so utterly unreliable as to render the use of the co-defendant's videotaped confession inherently prejudicial. While Norberto, not surprisingly, made no immediate outcry about his then-friend's startling revelations, his testimony could easily have been credited beyond a reasonable doubt by a jury, regardless of the videotaped confession by Benjamin, which itself was vigorously attacked at the trial by Benjamin, who contended that it had been coerced and staged by the police.

Accordingly, defendant Eulogio Cruz' motion for a mistrial and severance is denied.

Dated: June 10, 1983

/s/ FWE
FRED W. EGGERT
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 53

[Title Omitted in Printing]

DECISION DATED SEPTEMBER 26, 1983,
DENYING SEVERANCE

CERBONE, J.

The following constitutes the decision of the court on the defendant Eulogio Cruz's motion for a severance.

The case was originally assigned for trial to Justice Fred W. Eggert of this court, before whom the defendant made the identical motion before trial which was denied with leave to renew at the close of the trial evidence. At the end of the case the defendant moved for a mistrial and renewed his motion for severance.

Justice Eggert, in a well reasoned decision consisting of seven pages dated June 10, 1983, denied defendant Eulogio Cruz's motion for a mistrial and severance.

The defendant Eulogio Cruz now renews his original application for a severance before this court. It is to be noted that Justice Eggert's written decision denying the defendant's motion for a severance was rendered at the end of the trial evidence, at a time when the court was in a position to hear and evaluate all of the testimony which may have been considered detrimental to the defendant.

The courts in New York have consistently upheld the doctrine of the "law of the case", which is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as judges and courts of co-ordinate jurisdiction are concerned. *United States v United States Smelting Co.*, 339 US 186,198; *Insurance Group v Denver and R.G.W.R. Co.*, 329 US 607,612; *Messenger v Anderson*, 225 US 436,444; *Martin v City of Cohoes*, 37 NY 2d 162; *Civil Practice Law and Rules*, Rule 2221

and the written commentaries thereunder; People v Mason, 97 Misc 2d 706.

Accordingly, the decision and order of Judge Eggert, dated June 10, 1983, is the "law of the case", and is adopted by this court.

The defendant's application to sever is in all respects denied.

Dated: September 26, 1983

/s/ Joseph A. Cerbone
JOSEPH A. CERBONE
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 53

Ind. Nos. 1793, 2232/82

THE PEOPLE OF THE STATE OF NEW YORK

v.

BENJAMIN CRUZ & EULOGIO MEDINA CRUZ, DEFENDANTS

TRANSCRIPT OF PROCEEDINGS,
SECOND TRIAL

Before: Hon. Joseph Cerbone

September 28, 1983

Proceedings

* * * *

TESTIMONY OF POLICE OFFICER PETER RONDA

* * * *

[62] POLICE OFFICER PETER RONDA, shield number 18055, having been called by and for the People, having been duly sworn, testified as follows:

THE COURT OFFICER: The witness gives his name as Police Officer Peter Ronda R-O-N-D-A, shield number 18055, assigned to the 45th precinct Anti-Crime Unit, New York City Police Department.

* * * *

[81] As far as you know was this defendant, Benjamin Cruz, when you spoke to him, under arrest?

A No, sir.

Q When you spoke to him, sir, did he mention about a homicide that occurred in what we would call the 40th precinct?

A Yes, sir.

Q Could you tell us what he said with relation to a shooting that happened in, only in the 40th precinct? Can you tell us?

A I shot a guy who shot my brother, Chino in a gas station on 149th.

* * *

COLLOQUY

* * *

[114] MR. BLITZ: Your Honor, Counsel for Benjamin Cruz stated a few minutes ago on the record that he does not intend to put his client on the stand. In view of that, your Honor, I would respectfully move since I will not have an opportunity to cross examine his client, to redact from the video tape any mention of my client.

THE COURT: Denied. Anything else?

MR. BLITZ: Exception, your Honor.

Before the playing of the video tape I would ask your Honor to instruct the jury as to that they can only consider the video tape in the case of People against Benjamin-Cruz.

THE COURT: All right, I will so instruct them.

* * *

[119] THE COURT: Is there any question? Do you object to the tape going into evidence, is that correct?

MR. BLITZ: Yes, Judge.

THE COURT: Do you object to the redactions?

MR. BLITZ: To the redactions, no.

THE COURT: All right. Let's proceed now.

* * *

[120] THE COURT: Good afternoon. You are about to view and hear a video tape wherein Mr. Benjamin Cruz is interrogated. I charge you and instruct you that any statements that are made by Mr. Benjamin Cruz are to be considered by you only as against Benjamin Cruz.

Is that clear?

All right.

[121] MR. BLITZ: Any mention of Eulogio Cruz is not to be considered.

THE COURT: I said is to be considered by you only as against Mr. Benjamin Cruz. Whatever he says and whatever you hear is not to be considered by you in any manner whatsoever as against Eulogio Cruz.

You may proceed.

MR. ROSENBLATT: At this time, your Honor, I'm asking Mr. John Simminetti who is the video technician from the Bronx District Attorney to respectfully play this tape in front of the jury.

(Whereupon, said video tape was played.)

THE COURT: You may call your next witness.

* * *

TESTIMONY OF NORBERTO CRUZ

* * *

[122] NORBERTO CRUZ, having been called as a witness by and on behalf of the People, through an interpreter, having been first sworn, testified as follows:

THE COURT OFFICER: Be seated.

The witness gives his name as N-O-R-B-E-R-T-O Cruz, resident of Bronx County.

DIRECT EXAMINATION

BY MR. ROSENBLATT:

* * *

[123] Q By the way, Mr. Cruz, do you know these two defendants?

A Yes.

Q How long do you know Benjamin Cruz?

A About fifteen years.

Q Is he related to you?

A No.

Q Do you know him?

A Only by friendship.

Q Do you know him by Benjamin or by a nickname?

A Benjamin.

Q Do you know the defendant, Eulogio Cruz?

A Yes.

Q Are you related to him?

A Friendship, like friendship.

Q How long have you known Eulogio Cruz?

A About twenty-five years.

Q Did you know him from this country or from Puerto Rico?

A Puerto Rico.

[124] Q I direct your attention to May 29, 1981. Where were you living at that time?

A 151st Street and Cortland.

THE COURT: Where was he living?

THE INTERPRETER: 151st Street and Cortland, 340.

Q Did you have occasion to see anybody on November 29, 1981?

A Yes.

Q Who did you see, sir?

A Eulogio Cruz and Benjamin.

Q Where did you see them, sir?

A In my house, my apartment.

Q Could you approximate a time that you saw them that day?

A About one hour.

Q Do you know what time they came to your apartment? Could you estimate the time?

A Around ten.

Q Would that be ten o'clock in the morning or ten o'clock in the evening?

A In the morning.

Q When they came to your apartment did you make any observations as to defendant, Eulogio Cruz?

[125] A Yes.

Q What if anything did you observe as to Eulogio Cruz?

A He was very nervous and he had a bandage around his hand.

Q Did you notice anything about the bandage around his hand?

A Yes, it had blood.

Q Do you recall which hand it was?

A The right.

Q Did he come with Benjamin or did he come alone, Eulogio?

A He came with Benjamin.

Q Did you have any conversation with Eulogio Cruz when you saw this bandage with blood?

A Yes, I asked him what had happened to him.

Q And do you recall what he said to you, sir?

THE COURT: Wait, I direct you any statement made by Eulogio is to be taken into consideration by you only as against Mr. Eulogio Cruz.

Take it from there.

MR. ROSENBLATT: Thank you, [126] your Honor.

Q What did Eulogio tell you?

A That they had gone to give a hold up to a gas station and that he started struggling with him.

THE COURT: Excuse me, speak up. Raise your voice.

A He started fighting with the man and the man bent down. He took out a gun and fired and then Benjamin jumped up and fired at the man in the gas station.

Q Did he tell you why he went to the gasoline station?

MR. BLITZ: Objection.

THE COURT: Overruled.

A That he was going to give a hold up.

Q When Mr. Eulogio Cruz spoke to you at that time, where was Benjamin Cruz?

A Beside me.

Q Did you have a conversation with Benjamin Cruz?

MR. KATZ: Objection.

THE COURT: Overruled.

A Yes.

Q What did you say to Benjamin Cruz and [127] what did he say to you?

THE COURT: Wait. I now direct you, that any statement made by Mr. Benjamin Cruz is to be taken into consideration only as against Benjamin Cruz.

All right.

Q What did Benjamin Cruz tell you?

A That Eulogio had sent him to search the man, that he didn't, he hadn't done it well.

THE COURT: That he what?

THE WITNESS: That he hadn't done it well and then Benjamin, how do you say, Benjamin started arguing with Eulogio and then, that's when it happened, the thing of the gasoline station.

Q Did Benjamin Cruz tell you how Eulogio Cruz got hurt?

A No.

Q Did Benjamin Cruz tell you why they went to the gasoline station?

A No.

Q Did Benjamin Cruz tell you what he did at the gasoline station?

A Yes.

[128] Q What did he tell you that he did?

A That he saw the man bend over, take out the gun and fire. He fired at Chino and then he jumped up and fired at the man in the gasoline station.

Q Well, just for clarification, who fired at Chino? Did he tell you that?

A Yes, the man at the gasoline station.

Q How long did Benjamin and Eulogio stay at your house?

A About an hour.

Q Who else was present besides you, Benjamin and Eulogio in the apartment at that time?

A No one else.

Q Did there come a time that Eulogio left the apartment?

A Yes, at the hour.

Q Do you know, to your knowledge whether Eulogio had medical attention?

MR. BLITZ: Objection.

THE COURT: Yes, sustained.

Q Did you offer any help to Eulogio?

MR. BLITZ: Objection.

THE COURT: Overruled.

A Yes.

[129] Q What did you offer?

A I asked him if I could take him to the hospital.

Q What did Eulogio say, if you can take him to the hospital?

A He said it was very dangerous that he did not want to go to the hospital.

Q How long did Eulogio remain in the apartment?

A One hour.

Q How long did Benjamin remain in the apartment?

A The same time, the hour.

Q Did they both leave together?

A Yes.

Q Did they leave alone or with anybody else?

A With my brother. Then he was sleeping.

Q What brother was that? What is his name?

A Geraldo Cruz.

Q Is that Jerry Cruz?

A Yes.

Q When is the next time you saw Benjamin Cruz?

[130] A The following day.

Q Where was this that you saw Benjamin Cruz?

A In my house.

Q He came to your apartment?

A Yes.

Q Did he come there alone?

A Yes.

Q Who else was in the apartment when Benjamin Cruz came to your apartment?

A No one else.

Q Did you have a conversation with Benjamin Cruz?

A Yes.

MR. KATZ: Objection.

THE COURT: Overruled.

Q What if anything did he say to you and what if anything did you say to him?

THE COURT: Excuse me—

MR. BLITZ: Instruction to the jury, your Honor, as to this conversation.

THE COURT: Yes. Any conversation between this witness now and Benjamin [131] Cruz will be considered by you only as against the defendant, Benjamin Cruz.

Q What if anything did he say to you and what did you say to him?

A He told me to clean the blood that was in the car because it was very dangerous for Jerry.

Q Do you know what car he was talking about?

A Yes.

Q Whose car was that?

A The car was mine and I had given it to him.

Q Given it to who?

A To Jerry, Geraldo.

Q When did you give your car to your brother, Jerry Cruz?

A About two months before, before what happened.

Q When is the last time you saw Benjamin Cruz?

A The last time that he came to my house to clean the blood off the car.

Q And that was the next day after they both came together?

A Yes.

Q That's the last time you saw Benjamin Cruz?

[132] A Yes.

Q When is the last time you saw Eulogio Cruz?

A Eulogio Cruz, I do not remember.

* * *

Q By the way, have you ever been convicted of a crime?

A Driving without a license.

THE COURT: Driving without a license?

[133] THE WITNESS: Without a license.

Q When was that, sir?

A It's been about eight years.

Q Eight years ago?

A Yes.

Q Is that the only time you have been in trouble?

A The only time.

Q What did you do for a living?

A Mechanic. I work in mechanics.

Q Automobile mechanics?

A Yes.

MR. ROSENBLATT: No further questions, your Honor.

THE COURT: You may proceed.

MR. KATZ: Thank you, your Honor.

CROSS EXAMINATION

BY MR. KATZ:

Q Mr. Cruz, how old are you?

A Thirty-two. Thirty-two going on thirty-three.

Q You say that you were friendlier with Chino than you were with Benjamin, is that correct?

A Yes.

Q Chino is closer to your age, is that correct?

[134] A Yes.

Q How old would your brother be now if he was alive?

A Thirty-one, around there.

THE COURT: Keep your voice up, please. Keep your voice up.

Q So, that the three of you were contemporaries, around the same age, you Chino and Geraldo?

A Yes.

Q You have known this Cruz family, Mr. Chino and Benjamin Cruz family for a long time?

A Yes.

* * *

[136] Q I believe you stated you worked as an auto mechanic, is that correct?

A Yes.

Q Who do you work for?

A For myself.

Q Do you have a shop somewhere?

A Had.

Q When is the last time you had your shop?

A About ten years.

Q Ten years ago is the last time you had your shop?

A Yes.

Q From ten years ago till now did you use any other person's shop?

THE COURT: I can't hear you, sir. Will you keep your voice up?

Q You said you have not had your shop for ten years, is that correct?

A Yes.

Q And you have worked as a mechanic for [137] these past ten years?

A Yes.

Q Have you ever had any other source of income?

A No.

Q Mr. Cruz, you stated you received no other source of income other than as an auto mechanic, is that correct?

A Repeat it again.

MR. KATZ: Read it back.

(Whereupon, requested testimony was read back.)

A Yes.

Q Now, Mr. Cruz, I'm going to ask you if you recall testifying at a previous proceeding, yes or no?

A Yes.

Q And do you recall this gentleman seated right here, Mr. Blitz, do you recall this particular gentleman?

A Yes.

Q Do you recall he asked you certain questions?

A Yes.

[138] Q Do you recall Mr. Blitz asking this question: "QUESTION: Are you in good health? ANSWER: Yes."

Do you recall Mr. Blitz asking you that question and you giving that answer?

A Yes.

Q You also recall Mr. Blitz asking you this question: "QUESTION: When was the last time you worked? ANSWER: It was about two years."

Do you recall giving that answer?

A Yes.

Q You also recall Mr. Blitz asking you this question: "QUESTION: And how long have you been on welfare? ANSWER: More or less that same date, two years since I was suspended from work."

Do you recall being asked those questions by Mr. Blitz and giving those answers?

A Yes.

* * *

[139] Q Besides having your own shop you said you have not had it for approximately ten years and you said that you also worked as an auto mechanic since then, is that correct?

A Yes.

Q Where?

A In the street.

Q Do you work for any other place?

A No.

Q You stated that at about ten a.m. on November 29, 1981, Benjamin and Eulogio came to your house?

A Yes.

Q Where is your house?

A 340 151st Street.

Q Is it near where Eulogio lives?

A No.

[140] Q Is it near where Benjamin lives?

A No.

Q Where you live, is it a private house or an apartment building?

A Apartment.

Q And how big is your apartment?

A Four rooms.

Q Who lives in that apartment with you besides yourself?

A My wife, my children and Geraldo lived with me.

* * *

[142] Q And Jerry stayed in the living room, is that correct?

A Yes.

Q When you enter your apartment what room do you enter into?

A I pass through the living room.

Q Mr. Cruz, I believe you stated that at ten o'clock on November 29, 1981, your brother was home asleep, is that correct?

A Yes.

Q In the living room?

A In the living room.

Q And that's the room that Benjamin and Eulogio entered into, is that correct?

A Yes.

Q You stated that two months prior to November 29th you had given your brother, Jerry, the car, is that correct?

A Yes.

Q What kind of car was it?

A Ford, Falcon '68.

Q How long had your brother been living with you up until that time, talking about up until November 29?

[143] A About four months.

Q During those four months that he lived with you was he working?

A I do not know.

Q Did he ever tell you what he did for a living during those four months he stated with you?

A No.

Q Did he contribute to the upkeep of the household?

A Yes, he would help me.

Q He would give you money?

A Sometimes.

Q You never asked him how he got that money, is that correct?

A MR. ROSENBLATT: Objection, your Honor.

THE COURT: Overruled.

A No.

Q Now, about how much time again, referring to ten a.m., November 29, 1981, did my client, Benjamin Cruz, stay in your apartment?

A He never stayed in the apartment.

Q Well, he came into your apartment, did he not?

[144] A Yes, for one hour.

Q So, he stayed from approximately ten a.m. until eleven a.m., is that correct?

A Until eleven o'clock in the morning.

Q What did he do during the course of that hour that he stayed at your apartment?

A He was waiting that Jerry would get dressed up to go.

Q And did Jerry get dressed up and go?

A He got dressed up and he went.

Q With Benjamin and Eulogio?

A Yes.

Q Did you go with them also?

A No.

Q And then you did not see Benjamin again until the next day, is that correct?

A Yes.

Q That would be on November 30th?

A November 30th.

Q And, I believe you stated it was sometime around four p.m., is that correct?

A Yes.

Q Was he alone or was he with anyone?

A Benjamin was alone.

* * *

[145] Q Did there come a time, Mr. Cruz, when you told somebody about what Benjamin had told you on November 29th and November 30th? I asked him did there come a time.

A Yes.

Q And when was that?

A I don't remember well.

Q Perhaps I can refresh your recollection. Would April 27, 1982 help refresh your recollection?

A I don't remember.

Q Do you recall, I believe you already stated, that your brother died, is that correct?

A Yes.

[146] Q Do you know when your brother died?

A May 14, around there.

Q May or March?

A March, March.

THE COURT: March 14, 1982?

THE WITNESS: Yes.

Q And, did there come a time when you spoke to a police officer, a detective, in fact, concerning the death of your brother?

A Yes.

Q Was it shortly after your brother's death?

A Not too short.

Q Was it a day, a week, a month after your brother died you spoke to—

A About two weeks, more or less.

* * *

[148] Q Mr. Cruz, isn't it a fact that a few days after the death of your brother a Detective Wood came to your house?

A Yes.

Q And he discussed your brother's death with you?

A Yes.

Q Isn't it a fact, Mr. Cruz, that up until that time you made mention to no one of what Benjamin told you on November 29, 1981?

A Yes.

Q Isn't it a fact, Mr. Cruz, that you told Detective Wood about the conversations with Benjamin on November 29, 1981?

A Yes.

Q On April 27, 1981?

THE COURT: You understand the question?

THE WITNESS: Yes.

THE COURT: What is the answer, yes or no?

[149] THE WITNESS: Tell it to me again.

THE COURT: I suggest you qualify and simplify.

MR. KATZ: Let me try to rephrase it.

Q The statement concerning the robbery of the gas station that was told to you by Benjamin on November 29, 1981?

A Yes.

Q Now, isn't it a fact that you did not tell anyone about that statement until you told Detective Wood on April 27, 1982?

A Yes.

Q And that was some six months after the incident occurred?

A Yes.

MR. KATZ: No further question.

CROSS EXAMINATION

BY MR. BLITZ:

Q Mr. Norberto, which arm did you say Eulogio Cruz had a bandage on?

A The right.

Q Can you show us which hand?

[150] A Yes.

(Witness indicates.)

Q What part of the hand?

THE COURT: Excuse me, was it on the hand or was it on the arm?

THE WITNESS: In the arm.

MR. BLITZ: Pointing to the forearm, Judge.

THE COURT: Yes. Let the record so indicate.

MR. BLITZ: The inner aspect of the arm.

Q Mr. Norberto, you swore to tell the truth. Do you remember that?

A Yes.

Q Are you telling us the truth?

MR. ROSENBLATT: Objection, your Honor.

A Yes.

THE COURT: Overruled.

Q How do you know it was November 29th that they came to your home?

A How was that?

Q You said that they came to your house [151] on November 29th, is that correct?

A Yes.

Q You didn't tell anybody about it until sometime in April, is that correct?

A Yes.

Q Did you make any record of the date that they came to your house?

A No.

Q How do you know it was November 29th?

A There was a small party in my house.

Q When was there a small party in your house?

A They were celebrating, how do you say, my wife was at the hospital. She was coming out of the hospital and we were celebrating that she was coming out of the hospital.

Q When were you celebrating?

A The day before, the 28th.

* * * *

[152] Q When, before November 29, 1981 did you see Mr. Eulogio Cruz?

A The 29th.

Q You saw him on the 29th?

A The 29th.

Q When before the 29th did you see him last?

A I hadn't seen him.

Q For how long hadn't you seen him?

A Had been about two months.

Q Where had you seen him before?

A In my house, my brother had brought him over.

Q Why didn't you tell anybody on November 29th, November 30th or December 1st about the shooting on Southern Boulevard?

A Because my brother had the event. My brother had the event.

Q Well, did your brother have anything to do with that event?

MR. ROSENBLATT: I'll object to [153] it.

THE COURT: Overruled.

MR. ROSENBLATT: Which event, just for the record?

THE COURT: Can you clarify? I'll permit the question. I think the DA's objecting to the use of the word event.

MR. ROSENBLATT: I have no objection as to the substance.

MR. BLITZ: I withdraw that question. I'll put another question.

Q Did your brother tell you what happened on November 29th at a gas station on 149th Street?

MR. ROSENBLATT: Objection, your Honor.

THE COURT: Overruled.

A No, he never told me anything of what had happened.

Q And you never spoke to your brother about what had happened on November 29, is that right?

A What Eulogio had said.

Q About what happened?

A No, I had never talked to him about nothing [154] about that.

Q Were you there on 149th Street and Southern Boulevard?

A No.

* * * *

[155] Q You said Mr. Eulogio told you something on November 29th, is that right?

A Yes.

Q Did you tell anybody about it on January, 1982?

A No.

Q In February, 1982?

A I don't remember.

Q You don't remember if you told anybody?

A I don't remember. I don't remember.

Q What do you remember is the first time you told the police anything about what you have told us here today?

MR. ROSENBLATT: Objection to the form of the question, Judge.

THE COURT: I'll permit it. [156] First, do you understand the question?

THE WITNESS: No.

THE COURT: I'll sustain the objection.

MR. ROSENBLATT: I don't understand it.

Q When is the first time you told the police that Eulogio said something to you?

A That was in March 14th when Eulogio tried to take me to the place where they had killed my brother.

Q You don't like Eulogio, do you?

A Why not?

THE COURT: I can't hear you. Do you like Eulogio, yes or no?

THE WITNESS: Yes.

Q You have been his friend for twenty-five years, is that right?

A Yes.

* * * *

[157] THE COURT: You said that Eulogio told you something?

THE WITNESS: Yes.

[158] THE COURT: On the morning of November 29th, is that right?

THE WITNESS: Yes.

THE COURT: And, there came a time when you told the police what he told you?

THE WITNESS: Yes.

THE COURT: When was that?

THE WITNESS: I don't remember the day or the date.

THE COURT: Was it after your brother passed away?

THE WITNESS: Yes.

THE COURT: Take it from there.

Q Was it after Eulogio took you to the place where your brother died?

THE COURT: Yes or no?

A Yes.

Q Tha's when you went to the police, am I right?

A Yes.

MR. ROSENBLATT: Objection.

That's when he—

THE COURT: Overruled.

[159] Q Is that when you went to the police?

A Yes.

MR. BLITZ: No further questions.

* * * *

RE-DIRECT EXAMINATION

BY MR. ROSENBLATT:

* * * *

[160] Q When you spoke to the police did you speak to the police with reference to your brother's death, just answer yes or no?

THE COURT: Did you ever have a conversation with the police regarding the death of your brother, yes or no?

A Yes.

Q Was it then that you mentioned to the police as to what happened on November 29, 1981 at your apartment?

A Yes.

* * * *

RE-CROSS EXAMINATION

BY MR. BLITZ:

* * *

[162] THE COURT: There came a time when you told the police about what Mr. Eulogio told you on November 29th? Is that correct?

THE WITNESS: Yes.

THE COURT: Now, when you told the police about that was it something that you volunteered to them or was it something they asked of you?

THE WITNESS: No.

THE COURT: No? Was this [163] something you volunteered to them?

THE WITNESS: Yes.

THE COURT: All right.

Q And that you volunteered this because you are a good citizen?

THE COURT: Overruled.

MR. ROSENBLATT: I will withdraw the objection.

Q And you volunteered this because you were a good citizen, is that right?

A Yes.

MR. BLITZ: Thank you.

THE COURT: I will give you a chance.

RE-CROSS EXAMINATION

BY MR. KATZ:

Q Mr. Cruz, prior to your volunteering this information concerning the event of November 29th you had several conversations with the detective, is that correct?

THE COURT: Excuse me?

MR. ROSENBLATT: Which detective?

THE COURT: May we have the [164] time on this, please?

MR. ROSENBLATT: Thank you.

Q After you were informed of the death of your brother?

A Yes.

Q So, you had already spoken to Detective Wood?

A Yes.

Q On several occasions?

A Yes.

Q Prior to your telling him about what Benjamin told you on November 29th?

A Yes.

Q I believe you also testified, Mr. Cruz, that excluding Court proceedings the last time you saw Benjamin was on November 30th, is that correct?

A Yes.

Q You did not see him any other time other than in Court?

A Yes.

MR. KATZ: No further questions.

THE COURT: You may inquire.

[165] RE-DIRECT EXAMINATION

BY MR. ROSENBLATT:

* * *

Q When was the first time you met Detective Wood?

A On the date, 15th when he came to tell me [166] about the death of my—

THE COURT: Stop. Why don't you put the question was the first time you spoke to Detective Wood the time when you were advised about your brother's death?

THE WITNESS: Yes.

THE COURT: All right.

Q He came to your house to speak to you?

A Yes.

* * *

Q When the detective came to your house that was with reference to Jerry, am I correct?

A Yes.

[167] Q Was it then that you spoke, that you told him as to what Benjamin and Eulogio Cruz told you on November 29th or was it on a subsequent date?

A I don't remember.

MR. ROSENBLATT: Thank you.

* * *

RE-CROSS EXAMINATION

BY MR. BLITZ:

[168] Q Mr. Norberto, remember you told us before that Benjamin and Eulogio came to your apartment in the morning of November 29th?

A Yes.

Q And you said that Benjamin said something, Eulogio said something to you, is that correct?

A Yes.

Q Do you remember testifying in this Court, back in this courtroom, in this building about two months ago, do you remember?

A Yes.

* * *

Q Do you remember being asked this question and making this answer: "QUESTION: When you say they explained to you if you can recall who said what to you and what if anything did you reply."

* * *

[169] Q Do you remember being asked that question?

[170] A Yes.

Q Do you remember making this answer: "ANSWER: I asked Chino what had happened and Benjamin spoke."

Do you remember being asked that question, and making that answer?

A Yes.

Q Isn't it a fact Chino never said a word to you?

* * *

THE COURT: Excuse me, who is Chino?

THE WITNESS: Eulogio.

Q Isn't it a fact Chino never said anything to you at any time?

A Repeat it again.

Q Isn't it a fact that Chino never said [171] anything to you at any time?

A I know that he talked to me.

Q Isn't it a fact he wasn't even in your house on November 29th?

A He was in my house.

* * *

[172] RE-DIRECT EXAMINATION

BY MR. ROSENBLATT:

* * *

The question that was asked by, I believe Mr. Katz on cross-examination: "When you say they explained to you if you can recall who said what to you and what if anything did you reply, ANSWER: I asked Chino what had happened. Benjamin spoke."

Stopping at that point, did Benjamin speak at the same time Chino spoke?

[173] MR. BLITZ: Objection, your Honor.

THE COURT: Overruled.

MR. BLITZ: He is asking a question.

THE COURT: Overruled.

A Yes.

* * *

[176] Q Did Eulogio Cruz tell you on November 29, 1981 as to what happened during the robbery of the gasoline station?

THE COURT: Yes or no?

A Yes.

* * *

October 3, 1983
851 Grand Concourse
Bronx, New York

TESTIMONY OF DOCTOR JOHN PEARL

* * * *

[221] DR. JOHN PEARL, called as a witness by and on behalf of the People, having been first duly sworn, testified as follows:

THE COURT OFFICER: The witness gives his name as Dr. John P-E-A-R-L. The doctor is an Associate Medical Examiner located in New York County.

DIRECT EXAMINATION BY

MR. ROSENBLATT:

* * * *

[224] Q Could you please tell us something about your external findings before you did the autopsy?

A He was a swathy-skin man, about five feet four inches tall. He weighed about one hundred sixty-five pounds and he had most significantly two kinds of injuries on his body. He had gun—two gunshot wounds and he also had what are called blunt force injuries. The blunt force injuries are due to something like a blow or a fall, in other words to distinguish them from say, cutting time injuries or penetrating injuries like a bullet wound. In this case he had a laceration or tear in the skin at the bridge of his nose. He had bruises around both eyes, black eyes and he had an abrasion of his right cheek, a scrape mark on his right cheek. He also had a scrape mark on his left shoulder.

Q And these were your external findings, am I correct?

[225] A Part of them, yes. Those are the external blunt force injuries. He also had two gunshot wounds. I don't know what order, I can't tell from the autopsy what order the shots were fired and so I'm discussing them in arbitrary order.

One bullet wound was above the right ear, where the ear joins the scalp and around this wound was black powder, gun powder with a half inch radius. This bullet didn't go inside the skull it actually broke into two parts and the pieces exited, half and one inch behind the entrance wound.

The second bullet wound though is in the left side of the head towards the front. This wound went into the brain, went through the scalp through the skull and across the brain from the left side to the right side where I recovered a deformed lead bullet and the tract of that wound was backward, downward and toward the right. The first wound went backward, downward and also slightly towards the right.

* * * *

TESTIMONY OF DETECTIVE STEPHEN COLANGELO

* * *

[232] DETECTIVE COLANGELO, shield number 3074, New York City Police Department, Ballistics Squad, called as a witness by and on behalf of the People, having been first duly sworn, testified as follows:

THE COURT OFFICER: The witness gives his name as Detective Stephen Colangelo, C-O-L-A-N-G-E-L-O, shield number 3074, assigned to Ballistics Squad, New York City Police Department.

DIRECT EXAMINATION BY

MR. ROSENBLATT:

* * *

[235] Q Now, Detective, assuming that during the autopsy as testified by Dr. Pearl that surrounding one of the wounds there was a black powder ring surrounding one of the holes approximately half inch in diameter, the fact there was a black ring, powder ring surround the wound. What does that mean to you as an expert?

[236] A Well, I'd say the muzzle of the gun was quite close to the target, to the wound.

THE COURT: When you say "quite close," that could mean various things to various people but we all understand inches, feet and yards. When you say "quite close", can you translate that into inches, feet, yards or whatever?

THE WITNESS: Yes. I'd say somewhere, three to six inches from the target.

Q Between three and six inches?

A The muzzle of the gun.

Q At the time it was fired?

A Right.

* * *

October 4, 1983

851 Grand Concourse
New York, New York

SUMMATION ON BEHALF OF EULOGIO CRUZ

* * *

BY MR. BLITZ:

* * *

[318] Now, you, ladies and gentlemen, have a serious sophisticated problem and you recall that when you were selected for this jury you were asked could you separate the evidence as to Benjamin Cruz and as to Eulogio Cruz and you all said you could do that and now you are going to be called upon to do that.

His Honor will instruct you that anything that Mr. Ronda said, anything that Benjamin Cruz said, anything that Detective Wood said, that even referred to my client, you cannot consider. What does that mean? It means you are trying this murder case on sole evidence of Norberto Cruz as if you never tried Benjamin Cruz and only Eulogio Cruz will be tried when you deliberate.

[319] I'm not telling you how to do it or in what order to do it but just this is the way it has to be done.

His Honor will tell you that. You must consider as if you were trying the case of Eulogio Cruz for murder and what evidence have the People produced to prove him guilty beyond a reasonable doubt and if you recall the only testimony that connects my client with this crime is the brief words of Norberto Cruz when he said my client came into his apartment on November 29th.

Now, you heard and I don't want to go into it again, when Mr. Norberto Cruz' feelings were toward my client when they took him and these were his words: where they killed Jerry Cruz, my brother. You must consider that and you have a right to consider that testimony in determining whether or not he had a motive to lie.

Now, you cannot consider the death of Jerry Cruz against my client. That's another matter which will be determined at another time. You cannot consider that at all. You [320] are only concerned with the one crime. That's why I say this is a sophisticated process and you must reason it out and if someone says well, this was said about Eulogio Cruz or this was said about Eulogio Cruz, one of you or more of you must assert yourselves and say just a minute, your Honor said we cannot consider that.

Now, then, what is the question that remains in your mind? The question is is Norberto Cruz telling us the truth. Did Mr. Eulogio Cruz come to his apartment on November 29th with his hand bandaged, his right hand bandaged? Is there any evidence bearing in mind what you cannot consider and only what you can consider and you have a right in determining this case to consider the lack of evidence. His Honor will tell you that you can't guess or speculate, you must go by the evidence or lack of evidence. Is there any evidence that my client ever had an injury to his arm in this case? Have the People produced any medical evidence that Mr. Eulogio Cruz has an injury to his right arm or his left arm? [321] Is there any proof of that? There isn't any.

* * *

PROSECUTOR'S SUMMATION

* * *

BY MR. ROSENBLATT:

* * *

[330] Now, you see, this is the bottom line. They can't get away from this. On May 3, that is the time that they arrested Benjamin Cruz and that's the time they get the video statement, practically in substance as to what Norberto Cruz told the police several days ago.

Now, you heard this particular video by this young man that they are going to fix up the place and that there was a scuffle between the deceased. He didn't—he is working for a living, five o'clock in the morning. It isn't his money to give. Maybe he made the wrong choice, to fight for the money and he was [331] shot and killed. Can't get away from that. That's the bottom line because when Norberto Cruz told the police as to what Eulogio Cruz told them and Benjamin Cruz told them is substantiated afterward by Benjamin Cruz himself. That is the bottom line, they can't get away from it. Stop and think what I have said. The fact that Benjamin Cruz made that statement substantiates as to what Norberto Cruz is telling you. They are attacking him, of course he is a poor fellow. What else are they going to do? What else are they going to do? It is his brother. Have us believe but it is for you to decide where the proof lies. You have to be the judges as to the facts. You have to decide whether or not Benjamin Cruz and Eulogio Cruz went to this gasoline station on the morning of November 29, 1981 for the sole purpose of sticking it up and during the commission of that particular crime they killed that attendant. That is the evidence that you can't get away. The fact that he said it, Benjamin, the fact that both of them told Norberto Cruz because Benjamin in his statement [332] corroborates as to what they told him. This is afterward, can't get away from it. That's it regardless of how many little twists you throw in, give you certain innuendoes. Those are the facts.

What purpose, what motive does Wood have, Ronda have, Cirincione have, Zuba have, Fitzpatrick have, Coangelo have? What motive do they have to come in and tell you what they observed, what they observed? I respectfully submit that on that day when these two defendants maybe when Jerry Cruz, came to rob that station and as a result of that robbery some man is dead and that the people have proven not only by the statements of this young man, this defendant but also what they told another person.

Another thing, if Norberto Cruz was making this up, how would he know if he didn't see Norberto since November 29th, how would he know that he was shot in the arm because Benjamin Cruz, in his statement afterward on May 3rd tells you on his video that his brother was shot in the arm. Think it over now. Could [333] he be fabricating now, Norberto Cruz? I submit to you he told you the truth. He told you the way it is. The fact that he didn't come forward because maybe, in his heart, he knew his brother, Jerry Cruz, was involved. It is clear cut. If you accept what the defense will have you believe then you are going to believe that hair is growing from the palm of my hand. You have got the facts. You have got the evidence. You have heard the testimony and there is only one verdict and one verdict alone, that on this day these two defendants acting in concert with others were committing a robbery and there can only be one verdict and that is guilty.

Thank you.

* * * *

COURT'S CHARGE

* * * *

[344] In other words the fact that these defendants were not called as witnesses are not facts which are to be considered by you in arriving at your verdict. You must keep in mind, members of the jury, that each, though there are two defendants being tried together, in fact, you are trying two separate cases at the same time. You are called upon to [345] consider the case of each defendant separately because you are required to render a separate verdict as to each defendant. If you are satisfied beyond a reasonable doubt as to the guilt of one defendant and you entertain a reasonable doubt as to the guilt of the other defendant you may find the defendant as to whose guilt you have no reasonable doubt guilty and the other defendant, and as far as the other defendant is concerned, as to his guilt you do not entertain a reasonable doubt, not guilty.

During the course of the trial there has been testimony to the effect that both defendants, Benjamin Cruz and Eulogio Cruz made statements at different times to different people. You are hereby charged that the statements allegedly made by each defendant are to be considered solely as to the person who allegedly made those statements.

Therefore, I charge you that those statements allegedly made by the defendant, Benjamin Cruz, to Norberto Cruz who is not related to either of the defendants, statement made to [346] Detective Wood and the Assistant District Attorney which you heard and viewed on Video tape are to be considered solely against the defendant, Benjamin Cruz and have no bearing upon the guilt or innocence of Eulogio Cruz.

Similarly, those statements allegedly made by the defendant, Eulogio Cruz to Norberto is to be considered solely as against the defendant, Eulogio Cruz and have no bearing upon the guilt or innocence of Benjamin Cruz.

* * * *

JURY DELIBERATIONS

* * *

[376] THE COURT: Mr. Foreman, I have a note that reads as follows: We, the jury request the following: one, video replay with interpreter.

Second, entire testimony of Norberto Cruz.

Did you send that note?

THE FOREMAN: Yes, sir.

THE COURT: It is dated October 4, 1983, 1:56 p.m.,

[377] THE FOREMAN: William C. Saunders.

THE COURT: Would you have it marked Court's exhibit five?

(Whereupon, said note was marked as Court exhibit five.)

THE COURT: Please play the video.

(Whereupon, said video tape was played.)

THE COURT: This is the statement: I advise you now this should be considered by you only as against Mr. Benjamin Cruz. You all understand that? All right.

(Whereupon, video tape is over.)

THE COURT: Will you now please read the testimony of Norberto Cruz, both direct and cross examination.

(Whereupon, the reporter read the requested testimony.)

* * *

TRANSCRIPT OF VIDEOTAPED CONFESSION

[1]

DATE: May 3rd, 1982

PLACE: 45th Precinct

A.D.A.: Karen

STATEMENT OF: BENJAMIN CRUZ

BY MR. KAREN

Q This is Assistant District Attorney Allen Karen. It is now 11:27 p.m. in the morning, May 3rd, 1982 and I'm at the 45th Precinct. I'm here with videotape technician, John Simonetti, the D.A. Stenographer Whitter, D.A. Interpreter George Santiago, Detective Tinelli, Shield #2553 of the 40th Precinct, Detective George Wood, Shield #2408 of the 45th Precinct P.D.U. and Detective Henry Roje, Shield #3718 of the 45th Precinct.

I'm also here with a suspect I'm informed his name is Benjamin Cruz, is that your name, sir?

You have to say and answer out loud?

Q Yes.

[2bw] Q Mr. Cruz, this gentleman with the video camera, is making a movie of what is going on, he is focusing on you and that clock, do you understand?

A Yes.

Q Everthing we are doing is recorded, if anything were cut out there would be a gap in time on the clock, do you understand?

A Yes.

Q This lady is typing down everything we are saying she is the stenographer, do you understand?

A Yes.

Q I'm Assistant District Attorney, I'm not your lawyer I'm here to investigate a murder, should you be charged I would be the person who would try to prove

based on the evidence that you were guilty, do you understand what I do?

A No.

Q You don't understand what I do?

A I don't understand.

Q Let me explain again. I'm not your lawyer.

A Well, your job is like a lawyer, but ah—

Q Let me explain. I'm not your lawyer, I work with the police I try to prove based on the evidence that the defendants are guilty, you understand what I do?

A Yes.

Q I was called here because I'm told that you made [3bw] a statement to the police officer about your having been involved in a shooting and killing of a gas station attendant, at 149th Street and Southern Boulevard on November of 1981.

I am informed you made a statement that you shot the attendant in the head with a 357 magnum and that you killed and further that that attendant had shot your brother, Chino in the arm?

A Yes.

Q Now I'm going to give you your rights, I want you to listen carefully, if you don't understand anything let us know.

You have the right to remain silent and to refuse to answer questions, do you understand?

A Yes.

Q Anything you say maybe used against you in a court of law, do you understand?

A Yes.

Q You have the right to speak to a lawyer before speaking to the police or me and to have a lawyer present during any questioning now or in the future, do you understand?

A Yes.

Q If you can't afford a lawyer, one will be given to you for free, do you understand?

A Yes.

[4bw] Q If you don't have a lawyer available, you have the right to remain silent until you have had a chance to speak to to one, do you understand?

A Yes.

Q Now that I have given you your rights, have you understood what I have said?

A Yes.

Q Are you willing to tell us what you know about this killing of the gas station attendant in November of 1981?

A You mean tell the day of the robbery?

Q Yes, what happened?

A You know my brother and myself you know, we was there and my friend you know he was drunk you know he invited me to rob the gas station. Yes, he invited me you know, then later on yes we told the man in the gas station to put only one gallon of gasoline and then right there I took out the gun, I told him this is a hold up, I told him this is a hold-up you know, when I told him that this was a hold-up, so then we went inside you know and after we put him inside and then we asked him for the money you know, we asked him for the money and he said this is not to give away you know, this is not my money to give away and then Chino told him, then Chino said look if you don't give any money, you're going to have difficulty, I'm going to kill you, then Chino [5bw] told him give me all your money and then Chino hit him with the gun on top of the nose and both of them started fighting and then I went right away to the door and then I asked the guy to open the door, he said I cannot open the door and they continued fighting and they continued fighting and then the man came and they fired one shot and he hit Chino in the arm and then Chino came and he hit him with the gun you know and after he hit him with the gun, I told Chino to open the door and then Chino threw the gun to the door and then after he threw the gun, I told Chino to open the door, but he could not open the door and then the guy picked

up the gunlike to hit Chino in the head, I opened the door and then I said to Chino look out and then I went like this with the gun and I shot him in the head and I killed him.

Q How many guns were involved, how many guns did you, Chino and the third guy have?

A Three (3) guns.

Q Were they all loaded?

A Yes.

Q Whose guns were they?

A From previous hold-ups that we had done in the streets, in stores and all that.

Q How many hold-ups have you done in store, hold-ups?

A About six of them.

Q What kind of gun did you have?

[6bw] A I had a magnum.

Q Where did you get it?

A In the store, I took it away from the guy you know you see he had a knife at that time and thats, then when he took out the weapon and me with the knife, I tried to stop him and I took the gun away from him.

Q Now, this magnum is the gun you used to kill the attendant, right?

A Yes.

Q Where did you shoot the attendant?

A Right here.

Q Right between the eyes?

A Yes.

Q How far were you standing from the attendant when you shot him between the eyes?

A About standing right there and I went pow you know over the arm of my brother, my brother was in front I went over my brother like this, over the shoulder and I shot him.

Q So you were very close with the gun?

A Yes.

Q Did you aim before you shot?

A Yes, I pointed like that.

Q Right between the eyes?

A I pointed right there and pow and I fired.

Q What happened when you shot the gun, what did [7bw] he do?

Q The guy fell backwards and then after we took the money we started running.

Q How much money did you get?

A About \$62.00.

Q What did you do with it?

A We spent it.

Q How many guys were with you, two guys?

A Three.

Q A total of four guys?

A It was four (4).

Q Who are they?

A One was the driver and the other three who was inside the gas station.

Q Did the driver ever enter the gas station?

A He stood in the car.

Q What is his name?

A Jerry.

Q What is his last name?

A Cruz.

Q Where is he now?

A Dead.

Q Do you know how he died?

A They killed him.

Q Are you related to this person this Jerry Cruz?

A No.

[8bw] Q Do you know who killed him?

A No.

Q Now, who went into the gas station with you?

A Chino.

Q Whose that?

A My brother.

Q What is his real name?

A Eusibio Cruz Medina.

Q Where is he now?

A Where he is I don't know.

Q Where does he live?

A I don't know.

Q When did you last see him?

A Let me see, thursday.

Q Where does he hang out?

A Where he hangs out I don't know.

Q Who were the other two guys?

A The other two guys that was with us, one is by the name of Pacho, he is back in the Island.

Q And how about the other guy?

A It was me, Chino, Pacho and the deceased.

Q Did you mention something about someone named Caino?

A No.

Q Now, what kind of gun does Chino have?

[9bw] A .38 long.

Q How about the the guy back in the Island?

A He had a .38 short.

Q Now, ever since you took this magnum from this store keeper with the knife, have you kept it with you, have you kept it in your apartment?

A No, not with me I gave it to Chino to put away.

Q What did you do with the murder weapon after you shot the attendant?

A Well, I started running what did I do with the weapon, I sold it.

Q Who did you sell it to?

A The guy over there. I don't know his name he said he needed a gun and I sold the gun to him for \$250.00.

Q \$250.00, by the way, where do you live?

A 534-307 I live on 138th Street and Brook Avenue.

Q Who do you live with?

A My mother.

Q Anybody else?

A Yes, my sister, my mother and my other—

Q What is your brother's name?

A David Cruz.

Q And the other one?

A See my mother lives here, but they live in some place, the one who lives with my mother is the small one, Domingo Cruz and the other one is Neida Cruz.

[10bw] Q How old are you?

A Twenty-two.

Q What is your date of birth?

A October 26th, 1959.

Q Do you go to school or work?

A No.

Q Have you ever pleaded guilty or been convicted of any crime?

A No.

Q Now, when you went into the gas station, who announced the robbery?

A Chino.

Q Did he speak in English or in Spanish?

A Who Chino?

Q Yes.

A In Spanish.

Q And the attendant was he speaking in English or in Spanish?

A He was Spanish, Puerto Rican.

Q Now you mentioned at one point he had a gun, was it his own gun?

A It was his gun, a .22

Q Now, you mentioned that you shot this attendant between the eyes killing him; did he also fire a shot?

A Yes, he fired one shot he shot Chino over here

[11bw] Q In which arm?

A This one.

Q In the left arm?

A Yes, the left.

Q Now, did Chino go anywhere for treatment of that arm?

A No.

Q How do you know?

A We bandaged him and we took care of him.

Q How do you know it was a .22?

A It was a small one.

Q What happened to that gun?

A We took it and we threw it away.

Q Were there any other shots fired?

A Chino shot at him, he shot he shot him like to burn the clothes very close.

Q Now, today you went to the precinct to look for a detective to speak to him, right?

A Yes, look for these people but I couldn't find him.

Q And they were asking you about who killed Jerry Cruz, right?

A Yes, they were looking for who killed Jerry Cruz, but I did not kill him.

Q And thats when you told them that you had killed [12bw] this attendant on 149th and Southern Boulevard, right?

A Yes.

Q Now, when you spoke to the police, was there any interpreter there?

A Yes.

Q Did you understand what he said?

A The guy who spoke English?

Q The guy who spoke Spanish?

A Yes.

Q You understood him?

A Yes.

Q How have the police treated you so far?

A Like that.

Q No complaints?

A No.

Q And you told them you told the police about killing this attendant just like you told me, right?

A Yes.

Q Now, I read you your rights before and Mr. Santiago translated it into Spanish, at that point you

started telling the police what happened the policeman was speaking in spanish also told you those rights about to remain silent and having the right to a lawyer, having the right not to speak to anybody until you speak to a lawyer, about if you couldn't afford a lawyer, a lawyer would be given to you [13bw] for free, that officer told you the same rights in Spanish right?

A Yes, he told me that, he told me that yes when I was in that little room inside there.

Q Is there anything else you would like to tell us?

A Thats it.

Q Okay, I have no further questions. Its now its still May 3rd, 1982, it is now 11:48 p.m.

Q Were you fed since you have been here, did you have anything to eat?

A Yes.

Q Anything to drink?

A Yes, soda that he bought me.

Q Okay, the police have treated you okay?

A Two big macs that he bought me.

Q Thats Detective Tinelli. So they have treated you okay?

A Yes.

Q Okay, its now 11:49 p.m. May 3rd, 1982 this is Assistant District Attorney Karen concluding the interview with Benjamin Cruz.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Ind. No. 1793/82
2232/82

THE PEOPLE OF THE STATE OF NEW YORK

—against—

EULOGIO CRUZ, DEFENDANT

NOTICE OF APPEAL

SIR:

PLEASE TAKE NOTICE that the above-named defendant, EULOGIO CRUZ hereby appeals to the Appellate Division, First Judicial Department, from a judgment of conviction, conviction the said defendant of Murder in Second Degree, after trial on the 5th day of October, 1983 and thereafter sentenced on the 31st day of October, 1983 to served an indeterminate term in State's prison having a minimum of 15 years and a maximum of life. The said defendant hereby appeals from each and every part of said conviction, including the Sentence.

Dated: Bronx, New York
October 31, 1983

Very Truly Yours,
EULOGIO CRUZ
Defendant-In-Person
1414 Hazen Street
East Elmhurst, NY

TO: HON. MARIO MEROLA
District Attorney, Bronx County
851 Grand Concourse
Bronx, New York 10451

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on October 25, 1984

Present—Hon. Theodore R. Kupferman, Justice Presiding

David Ross
John Carro
Arnold L. Fein.
Fritz W. Alexander, II, Justices.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

—against—

EULOGIO CRUZ, DEFENDANT-APPELLANT

ORDER OF AFFIRMANCE ON APPEAL
FROM JUDGMENT
20988

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court. Bronx County (Joseph Cerbone, J.), rendered on October 31, 1983, convicting defendant of murder in the second degree, and said appeal heaving been argued by Robert Dean of counsel for the appellant, and by Mark L. Freyberg of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER:

JOSEPH J. LUCCHI
Clerk

Counsel for appellant is referred to
§ 606.5, Rules of the Appellate
Division, First Department.

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. BERNARD S. MEYER, Associate
Judge.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

against

EULOGIO CRUZ, APPELLANT

ORDER GRANTING LEAVE

I, BERNARD S. MEYER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceedings herein * questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to § 460.20 of the Criminal Procedure Law, it is therefore

ORDERED that permission be and it is hereby granted to the above-named appellant to appeal to the Court of Appeals.

Dated at Albany, New York
January 3, 1985

/s/ Bernard S. Meyer
Associate Judge

* Description of Order:

Order of the Appellate Division, First Department, entered October 25, 1984, affirming a judgment of the Supreme Court, Bronx County, rendered October 31, 1983, convicting defendant of murder in the second degree.

COURT OF APPEALS
STATE OF NEW YORK

THE HON. SOL WACHTLER, *Chief Judge*, Presiding

No. 413

THE PEOPLE &C., RESPONDENT

v.

EULOGIO CRUZ, APPELLANT

The appellant in the above entitled appeal appeared by William E. Hellerstein, Esq., The Legal Aid Society; the respondent appeared by Hon. Mario Merola, District Attorney, Bronx County.

The Court, after due deliberation, orders and adjudges that the order is affirmed. Opinion by Judge Simons in which Chief Judge Wachtler and Judges Jasen and Titone concur. Judge Kaye dissents and votes to reverse in an opinion in which Judge Meyer concurs. Judge Alexander took no part.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Bronx County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ Donald M. Sheraw
DONALD M. SHERAW
Clerk of the Court

Court of Appeals, Clerk's Office. Albany, October 17, 1985

STATE OF NEW YORK
COURT OF APPEALS

1 No. 413

THE PEOPLE &C., RESPONDENT

v.

EULOGIO CRUZ, APPELLANT

2 No. 414

THE PEOPLE &C., RESPONDENT

v.

BELTON BRIMS, APPELLANT

OPINION

Case #413—People v Cruz (Eulogio)

Order affirmed. Opinion by Judge Simons in which Chief Judge Wachtler and Judges Jasen and Titone concur. Judge Kaye dissents and votes to reverse in an opinion in which Judge Meyer concurs. Judge Alexander took no part.

Case #414—People v. Brims (Belton)

Order affirmed. Opinion by Judge Simons. Chief Judge Wachtler and Judges Jasen, Meyer, Simons, Kaye and Titone concur. Judge Alexander took no part.

Decided October 17, 1985

SIMONS, J.

Defendant Eulogio Cruz has been convicted of murder second degree committed during the course of a gas sta-

tion robbery in the Bronx. Defendant Belton Brims has been convicted of two counts of murder second degree and other crimes committed during the burglary of a private home in Spring Valley, New York. Both defendants were tried jointly with co-defendants and the principle issues submitted in these appeals are whether the courts' refusal to grant defendants' motions for severance resulted in trials impermissibly flawed contrary to the rule of *Bruton v United States* (391 US 123; *see, also, Roberts v Russell*, 392 US 293), and if not whether reversal is nevertheless required because the prosecutions failed to meet minimum standards of fairness (*see, People v Payne*, 35 NY2d 22; *People v La Belle*, 18 NY2d 405). In each trial statements of the co-defendants and the defendants were received in evidence. The basis for defendants' claims are their assertions not only that the content of their non-testifying co-defendant's statements did not "interlock" with their own but that even if the statements were substantially the same, defendants were prejudiced because the reliability of the co-defendants' confessions, made in the controlled environment of a police station, to police officers and under circumstances rendering them more credible, was greater than that of defendants' alleged confessions, made to lay witnesses having motives to falsify. Because of this difference in reliability, defendants contend that the jurors must have used the co-defendants' statements to resolve any doubts about defendants' guilt, even though they were instructed not to do so. Defendant Brims urges other grounds for reversal but those claims are either unpreserved or harmless (*see, People v Crimmins*, 36 NY2d 230). Neither defendant challenges the sufficiency of the evidence and, in the absence of legal error, the convictions should be upheld.

There should be an affirmance. The introduction of a co-defendant's testimony may, in some instances, substantially impair the defendant's right to confrontation or to a fair trial. The confessions of the defendant and co-

defendant in each of these cases interlocked, however, and even though they differed in length and in the circumstances under which they were made, the co-defendant's statements could properly be received with appropriate limiting instructions, regardless of differences in their comparative reliability (*People v McNeil*, 24 NY2d 550, *cert denied sub nom Spain v New York*, 396 US 937; *Parker v Randolph*, 442 US 62). Because defendants' statements not only interlocked with those of their co-defendants, but also contained legally corroborated admissions of all the elements of the crime of which they were convicted, defendants were not denied a fair trial and the motions for severance were properly denied.

PEOPLE v CRUZ

Defendant Cruz was indicted with his brother, Benjamin, for the felony murder of a gas station attendant committed November 29, 1981. Jerry Cruz, who was not related to defendant, was also a participant in the robbery. Some five months later Jerry Cruz was killed and during the course of the investigation of the homicide, the police interviewed his brother, Norberto. Norberto told the police that defendant and Benjamin came to his apartment the morning after the gas station robbery and that at the time defendant was nervous and wearing a blood-stained bandage around his right forearm. Norberto said that defendant told him that he and Benjamin had gone to a gas station in the Bronx the night before intending to rob it and that during Eulogio's struggle with the attendant the attendant had bent down behind the counter, procured a gun and shot him in the arm. Defendant said that Benjamin then jumped up and shot the attendant. Norberto said Benjamin told him a similar account of the incident, although he did not explain to Norberto how defendant was injured or that the brothers had gone to the station that night intending to rob it. Norberto said that he had offered to take defendant to the hospital for treatment of his wounds but defendant refused to go

because to do so was "very dangerous". At the trial, Norberto testified that he had been a friend of Eulogio's for 25 years, since they had grown up together in Puerto Rico. He remembered the date Eulogio and Benjamin came to his apartment because his wife was discharged from the hospital that day. When asked on cross-examination why he had not gone to the police earlier with this information, Norberto said that he could not because his brother Jerry "had the event".

Shortly after Norberto's statements to the police, Benjamin Cruz learned that they were looking for him and went to the police station. While he was being questioned about the death of Jerry Cruz, he blurted out that he and defendant had killed the gas station attendant in the Bronx. Subsequently he gave a complete confession to the police which was recorded on video tape. Defendant and his brother were indicted together for felony murder.

Before the trial defendant moved for a severance, but the motion was denied (*see*, 119 Misc 2d 1080). Both Norberto's testimony implicating the brothers and the video tape of Benjamin's confession were received in evidence during the trial with appropriate limiting instructions. The first trial was aborted because of juror misconduct but the confessions were again received at a second trial which resulted in the judgment now before us convicting defendant. In addition, the People presented police testimony, forensic evidence and photographs which established the robbery and the killing, the location of the victim's body, the injuries to his face and the substantial damage to the office, inferentially establishing defendant's struggle with the attendant before the murder. Also introduced was medical evidence of the trajectory of the bullets as they entered the victim's head from above, corroborating the evidence that Benjamin was above the attendant when he shot him. Defendant offered no evidence and both defendants were convicted of felony murder.

BELTON BRIMS

Defendant Belton Brims was convicted of two counts of intentional murder, two counts of felony murder, two counts of robbery first degree and two counts of burglary first degree. The charges arose out of an incident occurring December 28, 1980 when defendant and James Sheffield, with the assistance of Sheryl Sohn and Willie Brims, burglarized Sheryl's home and killed her parents. On January 1, 1981 defendant was arrested in New York on three other felony charges. He was a prime suspect in the Sohn murders at the time but, after he waived extradition, he was returned to New Jersey to answer felony charges against him there. Brims was subsequently convicted in New Jersey of armed robbery and sentenced to a term of imprisonment of twenty-five years to life. In the meantime, defendant, Sheryl Sohn and James Sheffield were indicted in New York for multiple charges arising out of the Sohn homicides. Defendant was returned to New York and the three defendants were tried together.

None of the defendants testified, but Sheryl Sohn's confession to the police, in which she told the police that she had helped Brims and Sheffield enter her parents' home the evening of the crime, was received in evidence against her. She said she had met the two men at a bar and told them she would unlock the door for them; they could await her parents' return from a party and then, when they returned, rob them. She also agreed that they could have all the valuables they found, except for a diamond ring which her mother would be wearing that she wished for herself. Sheryl said that defendant and others left for the house while she remained at the bar with a friend, but they returned shortly thereafter and told her they were unable to get in. She went home, checked the door again to insure that it was unlocked, and then returned and told defendant and Sheffield. Apparently they were still unable to enter the house and returned to the bar a third time. At that time Sheryl

explained the floor plan of the house to the defendants and they left. Her oral statements were later reduced to writing and admitted at the trial. Her statement was redacted to eliminate references to other crimes but the names were left in it.

The People introduced two prior statements by defendant. One was made to his cousin, Willie Brims, who had gone to the Sohn house with defendant and Sheffield but remained in the car while they were inside. Willie Brims was not charged with any crime despite his participation that night. He testified about the several trips from the bar to the house and return while defendant and Sheffield tried to gain entry, about leaving the house after the crime, and about the place where the participants had disposed of various pieces of evidence that night. Willie testified that when defendant returned to the car after leaving the Sohn's house on the night of the crime, he told him that he had "done some serious business" inside. Defendant explained that statement to him a few days later. He said that when the Sohns had returned to the house that night Sheffield "had beat [Mr. Sohn's] brains out with the butt of a gun" and that he had "drowned the bitch". Defendant said he had made Mrs. Sohn drink gin before drowning her and that she had fainted when she saw her husband assaulted. He then dumped her into the bath tub he had filled with water, face down. During this conversation with Willie, defendant showed him a photo of Jackie Shoulders and said she was his girlfriend. Defendant told Willie to "be cool" and in thirty to ninety days they would be paid [for the jewelry].

The People introduced another statement of defendant made to John Riegel, a New Jersey prisoner occupying a cell near defendant during his incarceration there in January, 1981. Riegel had been a former assistant bank vice-president and private entrepreneur who, after a series of financial setbacks, had turned to crime. Between 1977 and 1981 he had been the subject of several

charges involving forgery, issuing bad checks and the use of stolen credit cards.

Riegel testified that, during the nine days they were together in jail, defendant told him that he had planned the Spring Valley robbery with the slain couple's daughter, that he and his partner had waited in the house until the victims had returned home and that he had drowned the woman. Defendant said he had told his partner to kill the husband by hitting him over the head. Riegel said that defendant claimed he had received about twenty to twenty-two thousand dollars in the robbery and that all the daughter wanted for her help was a diamond ring. Defendant also told him that he had given part of the jewelry to a young girl from Virginia (Jackie Shoulders). Defendant was worried because her name was on a slip of paper in his pants pocket and, if the police found the slip and located her, they would discover that she had received from him a valuable piece of jewelry missing after the robbery.

There was substantial evidence to corroborate these confessions, indeed the evidence of defendant's guilt was overwhelming. Some of the more significant items included evidence of blood discovered in Willie's car in places consistent with his testimony about his passengers and where they entered and exited the car after the killings, and the ski mask and gun used the evening of the crime, found discarded as he had described. Forensic evidence was introduced which established that the gun was broken and that the pattern injuries on Mr. Sohn's skull exactly matched its shape. Forensic evidence also established that blood found on defendant's sneakers after the crime was the same, a very rare blood type possessed by Mr. Sohn. Defendant attempted to establish an alibi, that he was in New York City acquiring drugs for Sheryl at the time of the killing, but even his witnesses failed to support his alibi.

The Legislature has provided that the prosecution of two or more parties charged with the same offense or

offenses may be joined for trial (CPL 200.40). Recognizing that joinder results in prejudice, however, it granted the court the power to order separate trials when the public policy considerations of trial convenience, economy of judicial and prosecutorial resources and speed which underlie the statute are outweighed by unfairness to the accused. An application for severance is addressed to the Trial Judge's discretion. He must decide whether possible unfairness will result, whether it can be minimized by measures short of separate trials or whether severance is required. Normally, the trial court's ruling on the motion will not be disturbed but his discretion is not absolute, nor is his determination final, for "[a] retrospective view by an appellate court may reveal injustice or impairment of substantial rights unseen at the beginning" (*People v Fisher*, 249 NY 419, 427). Accordingly, we may properly review the courts' severance rulings in these two appeals.

When two defendants are tried together, the extrajudicial statement of one is hearsay as to the other and, if the statement is admissible at all, it may be admitted only when the jury is properly instructed that it may not consider one defendant's statement as evidence in assessing the guilt of the other. In *Bruton* the Supreme Court held that because of the substantial risk that a jury, despite such instructions to the contrary, will look to the incriminating extra-judicial statements of a non-testifying co-defendant, admitting such a confession violates defendant's right of confrontation (*Bruton v United States*, 391 US 123, *supra*; see also, *People v Safian*, 46 NY2d 181, 187, *cert denied* 443 US 912). A recognized exception to the *Bruton* rule holds that if the statements of the defendant and co-defendant are substantially identical, or "interlock", there is no violation of defendant's right to confrontation. The rationale is that if the statements interlock, the co-defendant's statement is no more inculpatory than is defendant's statement. It can hardly have the "devastating effect" on defendant's case re-

ferred to in *Bruton* if defendant similarly has admitted his complicity in the crime (see, *People v McNeil*, 24 NY2d 550, 553, *supra*). Key also is recognition that the right to confrontation is not absolute (*Dutton v Evans*, 400 US 74, 89; *People v Sugden*, 35 NY2d 453, 460). The confrontation clause is intended to insure fairness and accuracy by giving a defendant an opportunity to challenge evidence against him, particularly a co-defendant's statement, even though the jury may not consider it, because of the natural tendency of a co-defendant to shed blame and implicate his accomplice. The danger that the jury will consider unreliable hearsay is minimized, however, when the defendant has confessed. For these reasons, the interlocking confession exception to the *Bruton* rule was recognized early by this Court (*People v McNeil*, *supra*; *People v Galloway*, 24 NY2d 935) and by lower federal courts (see, e.g., *United States ex rel. Catanzaro v Mancusi*, 404 F2d 296, *cert denied* 397 US 942 [CCA 2]; *Mack v Maggio*, 538 F2d 1129 [CCA 5]; *United States v Walton*, 538 F.2d 1348 [CCA 8], *cert denied* 429 US 1025; *United States v Spinks*, 470 F2d 64 [CCA 7], *cert denied* 409 US 1011; *Metropolis v Turner*, 437 F2d 207 [CCA 10]; but cf. *United States v DiGilio*, 538 F2d 972 [CCA 3], *cert denied sub nom Lupo v United States*, 429 US 1038) and the Supreme Court of the United States has similarly recognized it (*Parker v Randolph*, 442 US 62). Indeed, one observer has interpreted the plurality opinion in *Parker* as holding that, as long as the defendant has confessed, "interlocking" is not required (see, Dawson, Joint Trials of Defendant in Criminal Cases; An Analysis of Efficiencies and Prejudices, 77 Mich L. Rev. 1379, 1421; but see, *Parker v Randolph*, 422 US 62, *supra*, at 75).

Confessions are "interlocking" if their content is substantially similar (*People v Smalls*, 55 NY2d 407, 415; *People v Safian*, 46 NY2d 181, *supra*, at 184; *Forehand v Fogg*, 500 F Supp 851, 853; compare *People v McNeil*,

supra, at 552 ["almost identical"]). The statements need not be identical, it is sufficient that both cover all major elements of the crime involved (see, *People v Woodward*, 50 NY2d 922; *People v Berzups*, 49 NY2d 417, 425; *Tamilio v Fogg*, 713 F2d 18, 20) and are "essentially the same" as to motive, plot and execution of the crimes (*United States ex rel. Ortiz v Fritz*, 476 F2d 37, 39; *Forehand v Fogg*, *supra*; cf. *United States v Kroesser*, 731 F2d 1509). Statements are substantially similar when defendant's confession is close enough to the co-defendant's with respect to the material facts of the crime charged to make the probability of prejudice so negligible that the end result would be the same without the co-defendant's statement (*People v Berzups*, *supra*, at 425; *People v Safian*, *supra*, at 188; see, also, *People v Fisher*, 249 NY 419, 426). Confessions do not "interlock" if a co-defendant's confession may be used to fill material gaps in the necessary proof against defendant (see, *People v Smalls*, *supra*; *People v Burns*, 84 AD2d 845).

The two sets of confessions before us interlock. There are differences, of course. There always will be, given human nature, the variations in human recall and the manner in which witnesses testify. Indeed, as a practical matter the evidence of witnesses is usually more suspect if they harmonize too closely. But the Cruz brothers agree, in their separate statements, on the date and target of the crime, the participants in it, the motive of robbery, and the essential facts of how defendant was injured and the station attendant killed. Although Benjamin's statement was substantially longer, the details included did not contradict or modify the essential elements of defendant's statement. The content of the confessions in *Brims* was markedly different, more because Sheryl Sohn had not entered the house and did not know or apparently contemplate that homicides would occur. But to the extent of her knowledge of the crime, her statement fully interlocked with defendant's two confes-

sions. Thus, she described the agreement with defendant and Sheffield, the several trips to the house to provide entry and the arrangement for disposition of the jewelry. Sheryl's confession, admissible only as to her, could hardly have prejudiced defendant whose recitation in his confession of the same events she described was substantially similar. Indeed, it is difficult to perceive how Sheryl's confession, which described only the preliminary arrangements with defendant, could have a "devastating" effect on defendant in view of his two confessions reciting the gory events that took place once he and Sheffield entered the Sohn home and murdered Sheryl's parents (*cf. People v Smalls, supra*).¹

Defendant's major complaint is not that the content of the confessions was dissimilar but that they differed in reliability; in the *Cruz* case Benjamin's 22 minute video-taped confession to the police was contrasted with defendant's oral confession to a friend with a possible motive to falsify² that was not revealed to the police for five months; in *Brims* a written confession to police officers was compared to oral confessions to, first, an accomplice who was extended leniency by the prosecutor and, second, a fellow prisoner awaiting disposition of the charges against him.

The contention that the exception to the *Bruton* rule for interlocking confessions does not apply when the confessions differ as to reliability has been rejected by this Court (*see, People v Woodward*, 50 NY2d 922, *affg* 66 AD2d 866 [*see, dissenting opn* of Shapiro, J. for facts at p 866]) and other courts (*see, People v Santanella*, 63 AD2d 744, *lv to app denied sub nom People v Tamilio*,

¹ On a related point made by defendant *Brims*, there was no error in receiving his two confessions although they differed in minor detail. Neither was hearsay as to him.

² Defendant speculates that Norberto may have sought revenge against him for the death of Jerry Cruz. There is nothing in the record to support that claim.

45 NY2d 784, *cert. denied sub nom Tamilio v New York*, 443 US 912; *Tamilio v Fogg*, 713 F2d 18, *rev'd* 546 F Supp 364). Indeed, when the rule was announced it was both anticipated that there would be differences in the scope and reliability of the confessions, and accepted that such differences would be tolerated (*see, dissenting opn*s in *People v McNeil*, 24 NY2d 550, *supra*, and *Parker v Randolph*, 442 US 62, *supra*). Thus, decisions following the *McNeil* case have held that the use of the confessions is not foreclosed because one confession is oral and the other is written (*People v Woodward, supra*; *Parker v Randolph, supra*) because one is made to police officers and the other to lay witnesses (*Tamilio v Fogg, supra*), or because one is long and the other is short (*see, People v Woodward, supra*; *People v Safian*, 46 NY2d 181, *supra*). Nor is the rule any different because defendant repudiates his confession or challenges its voluntariness. None of the confessions in these two prosecutions was unreliable as a matter of law and once admissibility was determined by the court, credibility was a question for the jury (*People v Woodward, supra*; *People v Anthony*, 24 NY2d 696, *cert denied* 396 US 991; *United States ex rel. Dukes v Wallack*, 414 F.2d 246, 247; *United States ex rel. Catanzaro v Mancusi*, 404 F2d 296, *supra*).

Defendant Cruz argues that, quite independent of any error in ruling on his constitutional right of confrontation, he is entitled to reversal because the trial violated fair-trial standards applicable to trials in New York involving multiple defendants and the violation resulted in "injustice or the impairment of substantial rights" (*see, People v Payne*, 35 NY2d 22, 26-27, *supra*; *People v La Belle*, 18 NY2d 405, 409, *supra*; *People v Fisher*, 249 NY 419, 427, *supra*; *People v Evans*, 99 AD2d 452). Defendant's right under that standard is broader than his right to confrontation. It may be violated even where the co-defendant has remained silent both before and during the trial or conversely has chosen to testify. A de-

defendant's right to a fair trial is not impaired, however, when there is substantial evidence of guilt independent of the co-defendant's statement (see, *People v Fisher, supra*, p 426), or when the defendant has himself made inculpatory admissions substantially identical to those offered against him, and that admission, properly corroborated, establishes the crime (see, *People v Snyder*, 246 NY 491), i.e., when the error is harmless or when there is no substantial risk of prejudice. Defendant's fair trial rights are violated, however, when he is prevented, because of the complexities of a joint trial, from presenting exculpatory evidence (see, *People v La Belle, supra*), or when, although defendant's right to confrontation has not been impaired, his co-defendant's confession includes material evidence of crime which results in substantial prejudice to defendant by filling gaps in the evidence against him. Thus, in *Payne* a severance was ordered because defendant's confession implicated him in lesser criminal activity, but did not resolve the question of whether he was guilty of felony murder. The court found a substantial risk that the missing evidence could be filled, and apparently was, by reference to the co-defendant's confession (*People v Payne, supra*).

The statement of defendant contained all the necessary elements to incriminate him in the felony murder. It interlocked with Benjamin's statement and it was corroborated by independent evidence sufficient to warrant the jury in accepting it as true, and sufficient to support a guilty verdict. That being so, the trial court could properly deny severance finding, in the sound exercise of its discretion, that there was no substantial risk that the jury would borrow information from Benjamin's hearsay statement to fill gaps in the evidence against defendant. If defendant was prejudiced by the joint trial, the prejudice resulted not from the fact that Benjamin's statement added substantial weight to the proof of defendant's guilt but from the fact that the denial of a severance prevented defendant from obtaining a more

favorable atmosphere in which to attack his confession. That may have harmed his case tactically, but it did not deny his fundamental right to a fair trial (see, *United States v Losada*, 674 F2d 167, 171; *United States v Werner*, 620 F2d 922, 928).

Somewhat similar to defendant Cruz's fair trial claim is defendant Brims' claim that he was prejudiced because he was prevented from calling Sheryl Sohn as a witness. There was nothing before the court, however, to indicate that Sheryl would testify for defendant or that her testimony would tend to exculpate him if she did (see, *People v Owens*, 22 NY2d 93, 97-98; *People v Kampshoff*, 53 AD2d 325, 338, cert denied 433 US 911).

Finally, defendant Brims contends that the defendants' defenses were antagonistic. A claim of antagonism may arise from a variety of circumstances, not easily cataloged, but it is clear that severance is not required solely because of hostility between the defendants, differences in their trial strategies or inconsistencies in their defenses. It must appear that a joint trial necessarily will, or did, result in unfair prejudice to the moving party and substantially impair his defense (*People v La Belle*, 18 NY2d 405, *supra*; *People v Papa*, 47 AD2d 902; see, generally, Anno Antagonistic Defenses as Ground for Separate Trials of Co-defendants in Criminal Case, 82 ALR3d 245; Dawson, Joint Trials of Criminal Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices, 77 Mich L Rev 1379, 1422-1425). Indeed, some courts have looked to see if the defenses are directly and mutually antagonistic before granting a severance, believing that the accuseds are not entitled to separate trials if one defendant seeks to exculpate himself by inculcating the other (see, *Rhone v United States*, 365 F 2d 980; *People v Braune*, 363 Ill 551, 2 NE2d 839).

It was Brims' contention at trial that he was innocent of the crime, that he had seen Sheryl Sohn that evening, but that he had been in New York City obtaining drugs

and returned only after the murders had been completed. He claimed that he obtained the Sohn jewelry from a friend of Sheryl's in exchange for supplying her with drugs. Sheryl Sohn's principal defense was to contest the voluntariness of her confession for, without it, there was no case against her. Failing this, she sought to establish that she did not actively participate in the robbery-murder and that she did not know the perpetrators would be armed. There were a few questions designed to establish that she acted out of fear of Brims because of money she owed him for prior drug transactions, but the evidence of duress was so slight that counsel neither argued the point in the summation nor requested a charge on it. Despite defendant's general claims that Sheryl Sohn's presence in the trial impeded his defense or reflected unfairly on him by causing the jury to unjustifiably infer he was guilty, there is nothing before us to establish that he was prevented from presenting exculpatory evidence by the court's desire to protect his co-defendant's rights. His present claim that he was prevented from establishing that he received the jewelry from Sheryl as payment for her prior drug purchases is contrary to his testimony at trial.

Accordingly, in each case, the order of the Appellate Division should be affirmed.

DISSENTING OPINION

JSK (dissenting)

With respect to *People v Cruz*, today's decision falls far short of the standards recognized by the majority. The concern expressed in *Bruton v United States* (391 US 123) was that substantial weight would impermissibly be added to the government's case if a codefendant's powerfully incriminating extrajudicial statements, not subject to cross-examination by defendant, were admitted at a joint trial. The exception to the *Bruton* rule for "interlocking confessions" rests on the premise that where two confessions are virtually identical, the jury in assessing defendant's guilt gains little or nothing from the co-defendant's confession. But confessions do not interlock if the co-defendant's confession may be used to fill material gaps in the necessary proof against defendant.

By no stretch of the imagination can it be said that the 22-minute videotaped confession of defendant's brother to the prosecution—inadmissible against defendant—added no substantial weight to the government's case against defendant, or did not fill material gaps in the necessary proof against him. The only direct incriminating evidence against defendant was his alleged statement to Norberto (*see, People v Cruz*, 119 Misc2d 1080, 1084), recapitulated in one question and answer during Norberto's brief testimony:

"Q. What did [defendant] tell you?

"A. That they had gone to give a hold up to a gas station and that he started struggling with him.

THE COURT: Excuse me, speak up. Raise your voice.

"A. He started fighting with the man and the man bent down. He took out a gun and fired and then Benjamin jumped up and fired at the man in the gas station."

Norberto had a prior record; worked intermittently "on the street" as a mechanic and received welfare payments for his family of six; accepted money from his brother, Jerry, who lived with him, though he testified he had no notion of how Jerry got that money; testified earlier that Benjamin—not defendant—had made the confession to him; and most significantly, reported nothing of defendant's alleged statement to him for five months, until after his brother Jerry had been murdered and defendant, in Norberto's words, "tried to take me to the place where they had killed my brother."

The videotape played to the jury, by contrast, was a 22-minute depiction of the crime by defendant's own brother, explicitly detailing his role as well as defendant's. In its reliability it was so overpowering that it necessarily added credibility to Norberto's testimony, and erased the indicia of nonreliability. As an example, while Norberto in his testimony related only that Benjamin and defendant had gone to hold up the gas station, Benjamin in his confession stated that several persons, including Norberto's brother Jerry, had done many hold-ups together including the one in issue. The clear statement * of Jerry's complicity explained for the jury not only why Norberto had not come forward with defendant's statement for five months, but also why defendant and Benjamin would have gone to Jerry's residence just after the crime. The jury could hardly have avoided looking to Benjamin's confession to resolve any doubts about whether his brother had in fact confessed to Norberto.

The issue is simply whether on these facts there should have been a severance. I do not find in the prior decisions of this Court the *per se* rule now established by this case

* Without Benjamin's vivid exposition, the only evidence to fill this logical gap is Norberto's meaningless, or at best ambiguous, comment that he did not come forward sooner because his brother "had the event."

that even an enormous disparity in reliability is not to be considered as a factor in deciding whether confessions interlock. In particular cases where there is a patent danger, as there was here, that the jury may from the inadmissible evidence, impermissibly draw evidence establishing defendant's guilt, then the viable alternative of ordering separate trials should be followed. The rationale of *Bruton* is otherwise rendered meaningless. I would reverse the order below and order a new trial.

SUPREME COURT OF THE UNITED STATES

No. 85-5939

EULOGIO CRUZ, PETITIONER

v.

NEW YORK

ON PETITION FOR WRIT OF CERTIORARI
TO THE APPEALS COURT
OF THE STATE OF NEW YORK

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 9, 1986